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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

VS.

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1955 CERTIORARI GRANTED OCTOBER 17, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

INDEX	Original	Print
Record from U.S.D.C. for the Northern District of Flor-		
ida, Tallahassee Division	1	. 1
Complaint	-1	1
Answer of Defendants to complaint		3
Appendix 1-Regulations defining area of pro-		
duction, etc., U.S. Dept. of Labor, Wage &		
Hour Division	20)	12
Appendix 2—Specimen contract	20	17
Amended answer of defendants to complain?	30	. 17
Request of defendants for admission of facts	4.4	26
Order on pre-trial conference	53	31
Seconded amended answer of defendants to complaint	5.1	32
Amended request of defendants for admission of		46 X
faets	71in	41
Plaintiff's response to defendants' request for admis-	8-2-6	
quest for admissions	83	48
Objections of pinintiff to portions of defendants' red		
quest for admissions	92	52
Notice of hearing on above objections	96	. 55

ecord from U.S.D.C. for the Northern Vistrict of Flor-		-
ida, Tallahassei Division Continued	Institut .	dirint
Amendment to plaintiff's response to desendants' re-	*	
quest for admissions \ '	1161	100
Order on pleadings	99	: 56
Plaintiff's response to defendants' request for admis		
sions	1.1114	56
Notice of trial	- Jun -	. 57
Interrogatories propounded by plaintiff to defendants	101 /	1.7
Answers of defendants to interrogatories propounded	1. 1	
by plaintiff	108	- 60
Exhibit "A" Series of Settlement Sheets, etc.	13	62
Exhibit & B" Series of Invoices	17	115
Plaintiff's request for admission of facts	201	141
Answer of defendant to plaintiff's request for ad-		
* mission of facts	204	1142
Notice of and motion of plaintiff for continuance?	206	43
Order continuing cause	207	143
Simulation for substitution of party plaintiff	208	143
Order of substitution	209	144
Motion of plaintiff for summary judgment	210	145
Motion of defendants for summary judgment	211	145
Memorandum derision, entered September 29, 1953	212	145
Order of, substitution	()()()	. 151
Supplemental momorandum decision and order, entered		1.
December 17, 1953	223	152
Judgment	1990	155
Notice of appeal	231 .	156
- Cost bond on appeal (omitted in printing)	1):3.)-	
Motion of defendants to stay injunction pending ap-		
peal	235	157
Order granting motion of defendants to stay injunc-		
tion pending appeal	236	137
Appellants' points to be relied upon on appeal.	237	158
Appellants' directions to the clerk for preparing.		
transcript of the record (omitted in printing).	1134 4	
Appellee's designation of contents of record (omitted		
in printing)	243.	
Clerk's certificate (omitted in printing)	245	
limite entry of Rument and submission (omitted in	h.	
printing)	246	
pinion; Rives, J.	247	-1,59
udgment	256	1666
lerks certificate (omitted in printing)	257	
rder extending time to file petition for writ of certiorari.	208	166
order allowing certificari	260	167
	4	

a (CLERK's Nort — The petition for writ of certiorari in this case seeks a review of separate judgments of U.S.C.A., 5th, entered on separate records in each of two cases, pleadings in which are materially different as For that reason, separate records have been printed.)

In United States District Court for the Northern District of Florida, Tallahassee Division

Civil Action No. 205

MAURICE J. TOBIN. SECRETARY OF LABOR, UNITED STATES DEPART-MENT OF LABOR, PLANNIFF

versus

Joseph T. Budd, Jr., and Florence W. Budd, Co-partners, Doing Business as J. T. Budd, Jr. and Company, defendants

COMPLAINT-Filed February 19, 1951

Plaintiff brings this action to enjoin defendants from violating the provisions of Section 15(a)(1), 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, Sec. 201, et seq.), as amended by the Fair Labor Standards: Amendments of 1949, approved October 26, 1949 (Public Law 393, 81st Cong., 1st Sess.; 63 Stat. 910), hereinnfter/called the Act4

H

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III

The Defendants Joseph T. Budd, Jr. and Florence W. Budd, both reside in the City of Quincy, State of Florida, within the jurisdiction of this Court. Said defendants are partners doing business under the name and style of J. T. Budd, Jr. and Company and are, and at all times hereinafter mentioned have been, the owners and operators of a place of business and packing house located at 225 East Clark Streets Quincy, Florida, where they are engaged in the production, sale and distribution of tobacco.

11

At all times hereinafter mentioned, defendants employed and are employing, approximately one hundred and eight (108) employees

33

in and about their said place of business and packing house in Quincy. Florida, in the production of tobacco for interstate commerce, within the meaning of the Act. Substantial quantities of the goods produced by these employees have been, and are being, prograved tor interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation and sold in interstate commerce and shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in interstate commerce is intended from defendants place of business to other states.

Defendants repeatedly have violated, and are violating, the provisions of Sections 6 and 45(a)(2) of the Act by paying to many of their employees for their employment in the production of goods for interstate commerce, as aforesaid, wages at rates less than seventy-five (75) cents an hour during the period since January 25.

3 VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of the wages, hours and other conditions and practices of employment to be made, kept and preserved by every employer subject to any provision of the Act. The said regulations and amendments thereto were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendants, employers subject to the provisions of the Act, repeatedly have violated, and are violating, the provisions of Sections 11(c) and 15(a)(5) of the Act in that since on or about July 1, 1948, they have failed to make, keep and preserve adequate records of their employees and the wages, hours are other conditions and practices of employment maintained by them, as required by the said regulations, in that the records kept by defendants failed to show, among other things, home addresses and occupations, with respect to many employees, and the time of day and day of week on which the employee's work-week begins.

VIII

Defendants repeatedly have violated, and are violating, the provisions of Section 15(a)(1) of the Act in that, since January 25, 1950, they have shipped, delivered, transported, offered for transportation and sold in interstate commerce and have

shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in interstate commerce was intended from their said place of business to other states, goods in the production of which many of their employees were employed in violation of Section 6 of the Act as alleged.

IX

Defendants have repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and re-training the violations bereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff prays judgment permanently enjoining and restraining defendants, their efficers, agents, servants, employees, attorneys and all persons acting, or claiming to act, in their behalf and interest from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

18.1 WILLIAM S. FYSON.

Solicitor.

Post Office address: Office of the Solicitor, U. S. Department of Labor, 1908 Commerce Building, Birmingham 3, Alabama, or Office of the Solicitor, U. S. Department of Labor, Peach-office Seventh Building, Atlanta, Georgia.

... (S.) BEVERLEY R. WORRELL,

Regional Attorney, Sylvia S. Ellison;

Attorney.

In United States District Court

ANSWER-Filed March 22, 1951

Come now defendants, by their undersigned attorney, and tor answer to the complaint of the plaintiff allege as follows:

184 . I

Answering Paragraph I, defendants deny that they are violating Section 13(a)(1), Section 15(a)(2), or Section 15 (a)(5), of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, C. 676, 52 Stat. 1060; U.S.C.A. Title 29, Section 2011 et seq.1, as amended by the Fair Labor Standards Act of 1949, approved October 26, 1949 (Public Law 393, 81st Congress; First Session, 63 Stat. 910), hereinafter called the "Act".

H

Defendants admit the previsions of Section 17 of the Act, but deny that they have violated the designated provisions of Sec-

tion 15 cited by the plaintiff so as togentitle plaintiff to an injunction.

III

Defendants admit all of the allegations of Paragraph III of the complaint, except the allegation that they are engaged in the production, sale and distribution of tobacco, which they deny

IV

Defendants admit that there are employed approximately 108 workers in their processing plant in Quincy, Florida, but defendants deny that the workers are employed by them and allege that said, workers are employed by the farmers whose names are hereinafter set out to perform purely agricultural services upon shade grown leaf tobacco as a necessary requisite for its preparation for market as an incident to agriculture, and that the defendants act solely as agents for such farmers, the complete details of which will be set forth in more complete detail in this answer.

The defendants deny that they are engaged in the production of tobacco for interstate commerce within the meaning of the Act. Defendants deny that substantial quantities of goods are produced by the alleged 108 employees (since defendants deny that the said employees produce goods in interstate commerce and deny that said

employees are expered by the Act), and likewise dary that such goods have been delivered, transported, offered for transportation and sold for interstate commerce and shipped or delivered, or sold with knowledge that shipment, delivery or sale thereof is intended from defendants place of business to other states so as to bring either the defendants or the alleged employees within the coverage of the Act. Defendants deny that the Act applies to them or to the 108 employees referred to upon either the factual situation of their employment or the type of service they perform, all of which will be specifically set forth later in this answer.

V.

Defendants deny that they have repeatedy violated and are violating the provisions of Sections 6 and 15(a)(2) of the Act by paying to many of their employees for their employment in the production of goods for interstate commerce wages at less than 75¢ per hour during the period since January 25, 1950. Defendants admit that the rate paid by hem for the farmers bereinafter named since said date has been less than 75¢ an hour, but that said employees are the employees of the farmers engaged in an operation incidental to agriculture and that neither the work performed nor the employees are covered by any provision of the act or by any lawful regulation adopted under the authority thereof, all of which will

Jully appear from the facts comparing the business of the defendants and work of the said 108 employees as will be later ser forth in full

VII.

Detendants admit the allegations of Paragraph VI, bitts deny that they have violated any of the regulations described in said paragraph, since neither detendants and employees are covered by the Act.

VII

Defendants deny that they are employers subject to the Act and; therefore, deny that they have violated, or that they are violating the previsions of Section II(c) and 15(a) (5) in that they have failed to make, keep and preserve adequate records of their employees and the hours and other conditions and practices of employment maintained by them as required by the afleged regulation on that the records kept by the defendants fail to show, among other than home addresses and occupations with despect to many employees and the time of day and the work day on which the employment work-week began.

VIII

Defendants deny that they have repeatedly violated and are violating the provisions of Section 15(a)(1) of the Act, in that since February 15, 1950, they have shipped delivered and transported, aftered for transportation and sold for interstate commerce, or have shipped, delivered or sold with the knowledge that shipment, delivery or sale thereof in interstate was interded from their said place of business to other states, the goods and the production of which many of their employees were employed in violation of Section 6 of the Act is alleged employees are covered by the Act

TX

Defendants deny that they have repeatedly violated provisions of the Act specified in the complaint. Defendants further deny that a judgment enjoining and restraining alleged violations set forth in the complaint is authorized by Section 17 of the Act.

1

For further answer to the plaintiff's Bill of Complaint the defendants allege as follows:

1. That United States Type 62 tobacco is a leaf tobacco grown and used exclusively for eigar wrappers, and the only place in the world where this particular tobacco is grown extensively and suc-

cessfully is in two limited small compact areas, one of which is in Madison County, Florida, and which constitutes a separate and distinct brea of production for such tobacco, and the other of which consists of Decatur and Grady Counties, Georgia, and Garden and Leon County; Florida. All the latter counties are contiguous, and tye Type 62 tobacco grown in said counties is grown within an air line radius of 30 miles of the town of Quincy, in Gadsden County. Florida: All of the tobacco grown in Madison County, Florida, is packed in said county, and, therefore, it is a separate area of production from the Quincy area, and to avoid confusion, for the purpose of this answer; it will be disregarded, although what is said . herein with reference to imreasonableness of the administrator's definition of area of production as applied to the Quincy area of production is equally applicable to Madison County. Florida. A copy of the definition of the Administrator of "Area of 1 Toddetion" is attached hereto marked Appendix 1.

2. Type 62 tobacco requires peculiar, special and painstaking cultivation, curing, and preparation for market: It is grown in fields enclosed with a cheesecloth shade which completely covers, and encloses the tobacco field. The shade cloth is supported by wires strung on posts placed at regular intervals throughout the field. When each leaf of tobacco reaches a certain state of maturity it must numediately be harvested. This harvesting process is known and described as "priming". The lower leaves are first picked, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures on up the stalk until the operation has been repeated six or seven times. The picking is designated as first primings or sand leaves, second primings, third primings, and so on. At each priming, the tobacco is immediately taken into a tobacco barn, located on the farm, where it is strung on sticks and dried by means of heat. The tobacco is completely or almost completely dried then permitted to absorb moisture and again dried. The drying process is repeated until the tobacco has reached an appropriate stage in the process of curing. There may be several primings ina single barn at one time, but as each priming reaches the appro-. priate stage of maturity; it must immediately be packed in boxes and taken to the processing warehouse to be processed and prepared for market as hereinafter described. Unless the tobacco is imme-

diately processed as hereinafter outlined, it will spot, spoil, or deteriorate and become valueless for cigar wrappers.

3. From the tobacco barns tobacco must be promptly taken to the packing or processing warchouse where it is placed in piles, known as bulks, consisting of and requiring from 3,500 to 4,500 pounds of tobacco, as any lesser amount will not generate and retain sufficient heat for the sweating process. At this stage the tobacco has absorbed a sufficient amount of water so that fermen-

tation begins and a sweating process takes place and a cantural heat created. During this stage the temperature within the bulk is closely watched and observed each day and from it to eight days thereafter, depending upon the temperature rise, the bulk is turned; that is to say, the bulk is broken up, the tobacco shaken outs the tobacco An the outsidents piaced on the inside, that on the top is placed on the bottom, and vice versa, until through this swearing or process of fermentation the tobacce is in a condition in which it may be handled or worked. At this stage the tobacco is then separated, graded, kased (sprayed with-water) and again placed in " bulks where the sweating and fermentation processes and the turnling of the bulk continues until such time as the tobacco is in ajcondition to be baled and ready for market. In all of this processing, nothing is added to or taken from the tobacco except through the natural processes of evaporation and fermentation. Any delay in the continuity of the process from the time the tobacco is picked from the stalk; or "primed" as above indicated, until it is baled is dangerously likely to result in such damage to or deterioration of the tobacco ay to make it unsalable as cigar wrapper tobacco.

12 4. That the bulking and processing as above outlined, to be successfully, efficiently and economically carried out requires a tremendons amount of valuable and expensive equipment, including a steam heated packing house equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, bulk covers, baling boxes and presses, wax paper, baling mats, packing, sorting, and grading tables, and, above all, the ability and knowledge of the process gained only through experience. All of which cannot economically be owned or had except by farmers owning and growing at least 100 acres of tobacco a year or more.

5. In the Quincy area of production there are approximately 300 farmers growing Type 62 tobacco of which 80 per cent grow less than 25 acres per year, and the majority of which grow from 1½ to 10 acres per year. As alleged above, approximately 4,000 pounds of tobacco are required to form an adequate bulk for the sweating of tobacco. Assuming a farmer to possess the necessary equipment, knowledge and the trained personnel to process his own tobacco, it would require the tobacco from at least 65 acres to form an adequate bulk of each priming. Thus, it is imperative that the smaller farmer utilize the services and facilities of an established processing plant or packing house in order that his tobacco may be prepared for market.

6. The town of Quincy. Florida, has grown up around, is supported by, and exists solely by virtue of the agriculture in the surrounding community. The principal, and almost sole source of in-

come to the town of Quincy is from the raising of Type 62 tobacco. Except for one sawmill and Fuller's Earth Mining. operation Ahere, are no industries or businesses in Gadsden County which do not have their roots in tobacco farming and other agricultural activities. Population of the town of Quincy, according to the 1950 United States census is 6.586: The growing of United States Type 62 tebacco and the processing or packing of this tobacco are complementary seasonal operations; that is to say, during the first half of the year the tobacco is being grown and during the latter half of the year it is being processed and prepared for market. The labor for both operations is drawn from the same labor source almost exclusively. The workers who are engaged in the processing and preparation of the tobacco for market is the same labor which grows it on the farms. This farm labor, for the most part, lives all year round on the various farms in tenant houses furnished rent free by the owner of the farm. In addition, to the house, this labor is furnished free water and a farm plot on which they may raise their own vegetables and a limited amount of livestock. Transportation is furnished them to and from their places of work. Those living in Quincy are transported to the farms during the farming season, and those living on the farms are transported to the packing houses during packing season. To all intents and purposes the farm labor and the packing house labor in the Quincy area are identical.

7. Under Section 13(A)(10) of the Fair Labor Standards Act, Congress specifically exempted from the operation of said act, any individual employed within the area of production (as defined by the administrator) employed in the handling, packing, storing.

the administrator) employed in the handling, packing, storing, 14 compressing, drying, or preparing in their raw or natural state of agricultural or horticultural commodities for market. In authorizing the administrator to define the area of production, it was contemplated by Congress that a practical and realistic definition of area of production would be prescribed by the administrator which would carry out the intent of Congress to exempt from the operation of the act any employee employed in agriculture, including farming in all its branches, and any practices performed by a farmer as incident to or in conjunction with farming operations, including preparation for market and thereby avoid the impact of the minimum wage and hour provisions on farm labor.

8. The administrator has by his definition of area of production, as applied to tobacco, excluded any processing plant and the employees thereof from such area of production, if the same be located within one mile of a town with a copulation of 2,500 and not more than 50,000; such definition as applied to the facts hereinabove alleged, is capricious, arbitrary, not based on logic or reason, not within the authority contemplated by the act and is, therefore, un-

reasonable and illegal. As a matter of fact and trason, and wathin the meaning and intent of the act, the packing house of these defendants is located within the area of production of the tobacco processed therein, and, therefore, these defendants and their employees are exempt from the operation of the act. As a result of this, there has been created a confused economy and the economic anomaly whereby employees at one packing house are held to be covered by the act while the same persons doing the identical work

in a packing house a few blocks away are held not to be covered. An even more rediculous situation exists where an employer is a grower who packs his own tobacco and also the tobacco of other growers and is required to comply with the act as to the employees who work in one packing house and not those who are employed in another. The arbitrary, capricious, illegal, invalid and unconstitutional definition by the administrator of the term "area of production" as applied to type 62 shade grown lead tobacco (if applied as the plaintiff contends), results in the tobacco of the small farmer being saddle, with an extra twenty-five cents per hour for processing labor, thus causing it to move into an open, free and competitive market at a serious disadvantage to the tobacco produced by those fortunate enough to own their own processing plants, and whose labor for processing is specifically exempt from the provisions of the act.

XL

For further answer to the plaintiff's Bill of Complaint, these defendants allege as follows:

1. That they have not nor have they through their employees or by any one employed by them engaged in the production, sale or distribution of tobacco, but allege that any and all tobacco processed in the packing house of the defendants for the years 1950 and 1951 has been processed by the particular farmer owning such tobacco under several contracts with the defendants, said contracts

being with the following named farmers who grow the number of acres listed opposite their respective names, as follows:

Name—Address	. \.		No. of Ac	res
C. C. Duke, Fowlestown, Ga			6	
T. W. Fletcher, Rt. 3, Quincy, F				
Gregory Brothers, Havana, Fla.		1	3	
Glenn Grifith, Calvary, Georgia.			7	
A. M. Haire, Greensboro, Fla			3	
Carl Haire, Greensboro, Ffa	,		4	2
Drew Haire, Gretna, Fla			8 - :	
P. J. Hammett, Cairo, Ga.			2	
Leo Harrison, Whigham, Ga				

Name Address No. of Acr	0.0
G. J. Hires, Greensboro, Fla.	
A. E. Hopkins, Calvary, Ga.	
M. J. Johnson, Rt. 3, Cairo, Ga.	
Jones & Watson, Whigham, Ga.	
W. C. Jones, Whigham, Ga. Rubin Jordan, Rt. 3, Quincy, Fla.	
Rubin Jordan, Rt. 3, Quincy, Fla.	
Glover Kemp, Havana, Fla. 1.2.10	
Ellis Maxwell, Rt. 3, Cairo, Ga.	
G. A. Maxwell, Calvary, Ga.	
Jack McFarlin, Quincy, Fla. 7	
H. L. McKeowa, Quincy, Fla.	
Lige McMillan, Chattahoochee, Florida	
F. W. McNair, Whigham, Ga.	
Joe McNair (White), Calvary, Ga.	
Joe McNair (Colored), Hayana, Fla.	. 0
Raymond Poppell, Concord, Fla. 2	
L. O. Rahberg, Cairo, Ga.	
O. W. Rowan, Greensboro, Fla.	
J. G. Rudd, Quincy, Fla. 3 Tyler Sanders, Route 3, Quincy 2	
Jeff Shelfer, Quincy, Fla	6
Charles B. Smith, Havana, Fla	
John B. Smith, RD, Quincy, Fla.	
17.	
W b a salar in the	1 1
W. B. Smith, Hayana, Fla.	
Spooner Farms, Greensboro	
(Murray Spooner) Howard Suber, Quincy Marvin Suber, Rt. 3, Quincy 7 1 2	-
Manufa Subar, Quarcy	
Worth Stiber, RD. Quincy 10	
W. T. Suber, Jr., RD., Quincy.	
Geo. C. Thomas, Jr., Cairo, Ga.	
C. T. Vanlandingham, Greensboro	
C. D. Vickers, Whigham, Ga	
C. D. Vickers, Whigham, Ga	
A. M. Womack, Havana	man of the last
52 farmers—Acres	

Each of said farmers has executed a contract with the defendants for the processing of their 1950 tobacco crop, a specimen copy of which contract is hereto attached and marked Appendix 2, and by this reference thereto hereby made a part hereof.

2. That said tobacco is not salable or marketable until the process and treatment as outlined in Paragraph X hereinabove is completed. Defendants allege that from time to time as the tobacco of each particular farmer is delivered to the defendants warehouse in Quincy for processing, an accurate record upon an

hourly or proportionate basis was kept, and the amount of time and expense accrning as a result of the processing of the toleacce of each farmer is kept and the exact cost of such processing it and to such farmer, and an account thereof made available to him. As said tobacco was and is delivered by the farmer age processing, it was and is divided into various primings and leggt separate

in the bulks by partitioning the different crops, primings, and owners with straps so that each farmer's tobacco can be identified at any time during the entire processing period while said tobacco is in the defendant's warehouse. After the processing has been completed, the tobacco is reported for sale under the control of the farmer; he may himself sell it or have it sold by the defendants for a commission; he has the right to accept or reject any offers as are made for it, or to make such sale to such buyers as he chooses or have the same sold in his behalf.

3. That the procedure outlined hereinabove constitutes a practice performed by a farmer as an incident to and in conjunction with his farming operations including preparation for market, delivery to storage or to market, and that under Section 13(a) (6) and Section 3(f) of the Fair Labor Standards Act, such operation and the employees engaged therein are exempt from the coverage of the act.

Defendants, therefore, of this Court humbly pray that it take jurisdiction of this cause, that it take such evidence as will be necessary to the issues raised by the complaint and this answers and that upon a final hearing it enter a final decree dismissing the complaint filed herein by plaintiff.

Respectfully submitted.

Of Caldwell, Parker, Foster & Wigginton,
Altorneys for Defendants.

19 Certificate of service tomitted in printing

APPENDIX 1 TO ANSWER

3

Title 29, Chapter V

Code of Federal Regulations Part 536

Regulations Defining Area of Production,

Pursuant to Section 7(c) and Section 13(a) (10) of the Fair Labor

Standards Act of 1938
As Amended December 1946
Department of Labor
United States of America

United States Department of Labor.
Wage and Houf Division
Title 29—Labor

.Chapter V-Wage and Hour Favision.

Part 536—Area of Production 1.

Definition of "Area of Production"

This regulation defines the "area of production" for purposes of and pursuant to sections 7(c) and 13(a)(10) of the Fair Labor Standards Act, and in accordance with the order of the United States Supreme Court in the case of Addison et al., v. Holly Ital Fruit Products, Inc. (322 U.S. 607). The Court in the Holly Hill case called for "delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more, or less near their productions. In referring to the legis ative history of the act, the Court stated that Congress also have in mind differences between "rural communities and urban centers."

In order properly to assess all the factors relevant to the determination of an appropriate definition, studies were undertaken by the Economics Branch of the Wage and Hour Division as a basis for promulgating a definition in accordance with the decision of the Court. Numerous conferences were held throughout the country with representatives of labor and of the industries involved. Voluminous

¹ Secs. 536.1 through 536.3 issued under the authority contained; in secs. 7(c) and 13(a)(10), 52. Stat. 1063, 1067; 29 U.S. 207(c), 213(a)(10).

economic data from every available source were as inheed and analyzed by the Division.

Six hearings with respect to proposed definitions of the farea of production, were held during 1944 and 1945 covering the industries concerned with: (1) Fresh traits and vegetables; (2) cotton; (3) tobacco; (4) grain seeds, dry chible bears, and dry edible peas;

22 agricultural and horticultural commodities not govered by other hearing. All parties appearing at the hearings were given an opportunity to be heard to question witnesses and to file briefs and additional statements subsequent to the hearings. Distance and population criteria formed the basis for substantially all of the definitions proposed at the hearings.

Among the factors considered in the formulation of the definition were; practices of marketing; the distances between farms and the enterprises carrying on the operations described in sections 7(c) and 13(a) (19); the kind of crop; the pattern of concentration of agricultural production with respect to the location of the establishments; the practices prevailing in a single as distinguished from a diversified crop area; geography; topography; population; the correlation between population and the character of the community as rural-agricultural or urban-industrial; urban-rural distinctions made by the Supreme Court in the Holly Hill case, by the Congress and by other agencies; the influence of urban community in the immediately surrounding area; and all other available information relating to the problem.

Based on the purpose and language of the statute, the data and arguments presented at conferences and hearings, the experience of the Division in administering the act, and full consideration of the factors enumerated herein and all other relevant matter, the Administrator has concluded that the most appropriate definition within the legal limitations is one which, taking into account all the foregoing considerations, delimits a geographical area; located in the

open country or in a rural community, and measured, for each establishment, by a radius expressed in miles.

These conclusions have been incorporated into, and form the basis of the definitions of farea of production, contained in this revised regulation:

Section 536.1 "Area of production" as used in section 71c; of the

Fair Labor Standards Act.

(a) An employer shall be regarded as engaged in the first processing of any agricultural or horticultural commodity (other than Puerto Rican leaf tobacco) during seasonal operations within the "Area of production" within the meaning of section 7(c) if he is so

24

through in an establishment which is located in the open country of a rural commodities 95 percent of which come from normal rural sources of supply located not more than the following per-line distances from the establishment:

- 31) With respect to graine soybeans, eggs, or tobacco-50 miles;
- (2) With respect to any other agricultural or horticultural commodities—20 miles.
 - (b) For the purposes of this section:
- (1) "Open country or rural community" shall not include any city, town or urban place of 2.500 or greater population or any area within:
 - (i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or
 - (ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000 or
- or greater according to the latest available United States Census.
- The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily mores, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.
- (3) The period for determining whether 95 percent of the agricultural or horticultural commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for 2 workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.
- (4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume, or other physical unit of measure, except that
- dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.
- (Sec. 536.1, as amended, approved by the Administrator December 18, 1946; published in the Federal Register December 25, 1946, 11 F.R. 14648.)

Section 536.2 Area of production, as used in section 13(a)(10) of the Fair Labor Standards Act.

- tal An individual shalf be regarded as employed in the facen of production" within the figuring of section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their/raw or natural state, or canning at agricultural or horticultural commodities for market og in making class or butter or other dairy products:
- (1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:
 - (i) With respect to the ginning 62 cotton-16 miles:
- (ii) With respect to operations on fresh fruits and vegetables—15 maes:
- (iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection-20 miles:
- 26 (iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, positry or eggs 50 miles; or
- With respect to Puerto Rican leaf tobacco, if he is engaged in piling, bulking, or otherwise handling anstripped tobacco for market in an establishment which is a first concentration point for such tobacco; provided, that employees engaged in stripping tobacco or engaged in piling, bulking, or otherwise handling stripped tobacco shall not be deemed to fall within this definition.
 - (b) For the purposes of this section:
- (1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within:
- (i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or
- (ii) Three air-line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or
- (iii) Five air-line miles of any city with a population of 500,000 or greater according to the latest available United States Census.
- The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the cestablishment if they are received (i) from tarms within such specified distance, or (ii) from tarm assemblers or other establishments through, which the commodity custo-

marily moves, which are within such specified distances and located in the open country or in the rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for 2 workweeks or more, except that until such time as an establishment has operated for such a calendar month the period

shall be the time during which it has been in operation.

ources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical unit that are not comparable.

(e) For the purposes of paragraph (a)(2) of this section:

"First concentration point" means a place where such tobacco is first assembled from nearby farms for such preparation for market but shall not include any establishment normally receiving a portion of the tobacco assembled from other concentration points, nor any establishment operated by a manufacturer for the preparation of tobacco for his own use in manufacturing.

(Sec. 536, as amended, approved by the Administrator December 18, 1946; published in the Federal Register December 25, 1946; 11 F. R. 14648.)

Section 536.3 Petition for amendment of regulations.

Any enterested person or association wishing a revision of the foregoing regulations may submit in writing to the Administrator a petition for amendment thereof, setting forth the changes desired and the reasons for proposing them. If upon inspection of the petition the Administrator believes that reasonable cause for amendment of the regulations is set forth, the Administrator will either schedule a hearing with due notice to interested parties or will make other provisions for affording interested parties an opportunity to present their views either in support of or in opposition to the proposed changes.

(Sec. 536.3, as amended, approved by the Administrator March 12, 1941; effective April 1, 1941; published in the Federal Register

March 18, 1941, 6 F.R. 1477.)

29 APPENDIX 2 TO ASSWER—Specimen Contract.

Mr. J. T. Budd, Jr. Quincy, Florida

Dear Sir:

I propose the following agreement for your acceptance:

I will deliver all my 1950 crop of shade-grown tobacco to your packing house in proper kase for sweating and, thereafter, employ and pay from my funds such labor as may be nece sary to sweat, sort, grade and bale the tobacco and otherwise prepare the same for sale in the market.

My tobacco will not be mingled with any other tobacco. Its identity will be maintained at all times and throughout every step of its preparation. It will be insured for my account when it is delivered to the warehouse.

You are hereby given a lies apon my tobacco crop and the proceeds of any insurance thereon for the sums herein agreed to be paid by me.

Of essence in this agreement is the fact that I, through my employees and the use of rented property, will prepare my crop for market as a farm operation exempt from the provisions of the Fair Labor Standards Act.

I agree to the above and will perform in accordance with the terms of the proposal.

J. T. BUDD, JR., & Co., (Not Inc.)

By

30 IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF DEFENDANTS-Filed May 12, 1951

Come now defendants, by their undersigned attorneys, and for their amended answer to the complaint filed herein, allege as follows:

Answering Paragraph 1, defendants deny that they are violating Section 15(a)(1), Section 15(a)(2), or Section 15(a)(5), of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, C. 676, 52 Stat. 1060; U.S.C.A. Title 29, Section 201, et seq.), as amended by the Fair Labor Standards Act of 1949, approved October 26, 1949 (Public Law 393, 81st Congress, First Session, 63 Stat. 910), hereinafter called the "Act".

II

Defendant admits the provisions of Section 17 of the Act, but deny that they have violated the designated provisions of Section 15 cited by the plaintiff so as to entitle plaintiff to an injunction.

III

Defendant admit all of the allegations of Paragraph III of the complaint, except the allegation that they are engaged in the production, sale and distribution of tobacco, which they deny.

31 IV

Defendants admit that there are employed approximately 108 workers in their processing plant in Quincy, Florida, but defendants deny that the workers are employed by them and allege that said workers are employed by the farmers whose names are hereinafter set dut to perform purely agricultural services upon shade grown leaf tobacco as a necessary requisite for its preparation for market as an incident to agriculture, and that the defendants are solely as agents for such farmers, the complete details of which will be set forth in more complete detail in this answer.

The defendants deny that they are engaged in the production of tobacco for interstate commerce within the meaning of the Act. Defendants deny that substantial quantities of goods are produced by the alleged 108 employees (since defendants deny that the said employees produce goods in interstate commerce and deny that said employees are covered by the Act), and likewise deny that such goods have been delivered, transported, offered for transportation and sold for interstate commerce and shipped or delivered, or sold with knowledge that shipment, delivery or sale thereof is intended from defendants' place of business to other states so as to bring either the defendants or the alleged employees within the coverage of the Act. Defendants deny that the Act applies to them or to the 108 employees referred to upon either the factual situation of their employment or the type of service they perform, all of which will be specifically set forth later in this answer.

Defendants deny that they have repeatedly violated and are violating the provisions of Section 6 and 15(a)(2) of the Act by paying to many of their employees for their employment in the production of goods for interstate commerce wages at less than 75c per four during the period since January 25, 1950. Defendants admit that the rate paid by them for the farmers hereinafter named since said date has been less than 75c an hour, but that said em-

ployees of the farmers engaged in an operation incidental to agreeulture and that neither the work performed nor the employees recovered by any provision of the act or by any lawful regulation adopted under the authority thereof, all or which will fully appear from the facts concerning the business of the defendants and work of the said 108 employees as will be later set forth in full.

VI

Defendants admit the allegations of Paragraph VI, but deny that they have violated any of the regulations described in said paragraph, since neither defendants nor said employees are covered by the Act.

VII

Defendants deny that they are employers subject to the Act and, therefore, deny that they have violated, or that they are violating the provisions of Section 11(c) and 15(a)(5) in that they have failed to make, keep and preserve adequate records of their enployees and the hours and other conditions and practices of employment maintained by them as required by the alleged regulation in that the records kept by the defendant fail to show, among other things, home addresses and occupations with respect to many employees and the time of day and the work day on which the employment work-week began.

VIII

Defendants deny that they have repeatedly violated and are violating the provisions of Section 15(a)(1) of the Act, in that since February 15, 1950, they have shipped, delivered and transported, offered for transportation and sold for interstate commerce, or have shipped, delivered or sold with the knowledge that shipment, delivery or sale thereof in interstate commerce was intended from their said place of business to other states, the goods and the production of which many of their employees were employed in violation of Section 6 of the Act as alleged, since defendants deny that either they or their alleged employees are covered by the Act.

ÍΧ

Defendants deny that they have repeatedly violated provisions of the Act specified in the complaint. Defendants further deny that a judgment enjoining and restraining alleged violations set forth in the complaint is authorized by Section 17 of the Act.

1.

For further answer to the plaintiff's bill of complaint, the defendants allege as follows:

1. That United States Type 62 tobacco is a leaf tobacco grown and used exclusively for eigar wrappers, and the only place in the world where this particular tobacco is grown extensively and successfully is in two limited, small compact areas. one of which is in Madison County, Florida, and which constitute a separate and distinct area of production-for such tobacco, and the other of which consists of Decatur and Grady Counties, Georgia. and Gadsden and Leon Counties, Florida. All the latter counties are contiguous and Type 62 tobacco grown in said counties is Lrown within an air line radius of 30 miles of the town of Quincy, in Gadsden County, Florida. All of the tobacco grown in Madison County, Of lorida, is packed in said county, and, therefore, it is a separate area of production from the Quincy area, and to avoid confusion, for the purpose of this answer, it will be disregarded, although what is said herein with reference to unreasonableness of the administrator's definition of area of production as applied to the Quincy area of production is equally applicable to Madison County, Florida. A copy of the definition of the Administrator of "Area of Production" is attached hereto marked Appendix 1.

2. Type 62 tobacco requires peculiar, special and painstaking cultivation, curing, and preparation for market. It is grown in fields enclosed with a cheesecloth shade which completely covers and encloses the tobacco field. The shade cloth is supported by wires strung on posts placed at regular intervals throughout the field. When each leaf of tobacco reaches a certain state of maturity, it must immediately be harvested. This harvesting process is known and described as "priming". The lower leaves are first picked, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures on up the stalk until the

operation had been repeated six or seven times. The picking is repeated as the tobacco matures on up the stalk until the operation has been repeated six or seven times. The picking is designated as first primings or sand leaves, second primings, third primings and so on. At each priming, the tobacco is immediately taken into a tobacco barn, located on the farm, where it is strung on sticks and dried by means of heat. The tobacco is completely or almost completely dried then permitted to absorb moisture and again dried. The drying process is repeated until the tobacco has reached an appropriate stage in the process of curing. There may be several primings in a single barn at one time, but as each priming reaches the appropriate stage of maturity, it must immediately be packed in boxes and taken to the processing warehouse to be

processed and prepared for market and hereinafter described. Unless the tobacco is immediately processed as hereinafter outlined, it will spot, rot or deteriorate and become valueless for any purpose.

3. From the tobacco barns tobacco must be promptly taken to the packing or processing warehouse where it is placed in piles, known as bulks, consisting of and requiring from 3,500 to 4,500 pounds of tobacco, as any lesser amount will not generate and retain sufficient heat for the sweating process. As this stage the tobacco has absorbed a sufficient amount of water so that fermentation begins and a sweating process takes place and a natural heat created. During this stage the temperature with the bulk is closely watered and observed each day and from six to eight days thereafter, depending upon the temperature rise, the bulk is furned;

that is to say, the bulk is broken up, the tobacco shaken out, the tobacco on the outside is placed on the inside, that on the top is placed on the bottom, and vice versa, until through this sweating or process of fermentation the tobacco is in a condition in which it may be handled or worked. At this stage the tobacco is then separated, graded, kased (sprayed with waters and again placed in bulks where the sweating and fermentation processes and the turning of the bulk continues until such time as the tobacco is in a condition to be baled and ready for market. In all of this handling, nothing is added to or taken from the tobacco except through the natural processes of evaporation and fermentation. Any delay in the continuity of the treatment from the time the tobacco is picked from the stalk, or "primed" as above indicated, until it is baled is dangerously likely to result in such damage or deterioration of the tobacco as to make it unsalable for any purpose.

4. That the bulking and handling as above outlined to be successfully, efficiently and economically carried out requires a tremendonsly large amount of valuable and expensive equipment, including a steam heated packing house equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, bulk covers, baling boxes and presses, wax paper, baling mats, packing, sorting, and grading tables, and, above all, the ability and knowledge of the process gained only through experience. All of the above cannot be economically owned or had except by farmers owning and growing at least 100 acres of tobacco a year or more.

5. In the Quincy area of production there are approximately 300 farmers growing Type 62 tobacco of which 80 per cent grow less than 25 acres per year, and the majority of which grow from 1½ to 10 acres per year. As alleged above, approximately 4,000 pounds of tobacco are required to form an adequate bulk for the sweating of tobacco. Assuming a farmer to pos-



sess the necessary equipment, knowledge and the trained personnel to process his own tobacco, it would require the tobacco from at least 65 acres to form an adequate bulk of each priming. Thus, it is imperative that the smaller farmer utilize the services and facilities of an established processing plant or packing house in order that his tobacco may be prepared for market.

6. The town of Quiney, Florida, has grown up around, is supported by and exists solely by virtue of the argriculture in the surrounding community. The principal, and almost sole source of income to the town of Quiney is from the raising of Type 62 to-bacco. There are few industries or businesses of consequence in Gadsden County which do not have their roots in tobacco farming and other agricultural activities. Population of the town of Quiney, according to the 1950 United States census is 6,586. The growing of United States Type 62 tobacco and the handling or packing of this tobacco are complementary seasonal operations; that is to say, during the first half of the year the tobacco is being grown and during the later half of the year it is being processed, and prepared for market. The labor for both operations is drawn from the same labor source almost exclusively. The workers who are engaged in the processing and preparation of the tobacco for

market is the same labor which grows it on the farms. This
farm labor, for the most part, lives all year round on the
various farms in tenant houses furnished rent free by the
owner of the farm. In addition to the house, this labor is furnished
free water and a farm plot on which they may raise their own
vegetables and a limited amount of livestock. Transportation is
furnished them to their places of work and return. Those living in
Quincy are transported to the farms during the farming season, and
those living on the farms are transported to the packing houses during packing season. To all intents and purposes the farm labor
and the packing house labor in the Quincy area are identical.

7. Under Section 13(A)(10) of the Fair Labor Standards Act, Congress specifically exempted from the operation of said act, any individual employed within the area of production (as defined by the administrator) employed in the handling, packing, storing, compressing, drying, or preparing in their raw or natural state of agricultureal or herticultural commodities for market. In authorizing the administrator to define the area of production, it was contemplated by Congress that a practical and realistic definition of area production would be prescribed by the administrator which would carry out the intent of Congress to exempt from the operation of the act any employee employed in agriculture, including farming in all its branches, and any practices performed thy a farmer as incident to or in conjunction with farming operations,

the minimum wage and hour provisions on farm labor.

8. The administrator has by his definition of area of production, as applied to tobacco, excluded any processing plant and the employees thereof from such area of production, if the same be located within one mile of a town with a population of 2,500 and not more than 50,000; such definition as applied to the facts hereinabove alleged, is capricious, arburary, not based on logic or reason, not within the authority contemplated by the act and is, therefore, unreasonable and illegal. As a result of this, there has been created a confused economy and the economic anomaly whereby employees at one packing house are held to be covered by the act while the same persons doing the identical work in a packing house a few blocks away are held not to be covered. An even more-ridiculous situation exists where an employer is a grower. who packs his own tobacco and also the tobacco of other growers and is required to comply with the act as to the employees who work inone packing house and not those who are employed in another. As a matter of fact and reason, and within the meaning and intent of. the act, the packing house of these defendants is located within the area of production to the tobacco processed therein and, therefore, these defendants and their employees are exempt from the operation of the act. The arbitrary capricious, illegal, invalid and unconstitutional definition by the administrator of the term "area of production" as applied to type 62 shade grown leaf tobacco (if ap-, plied as the plaintiff contends), results in the tobacco of the small farmer being saddled with an extra twenty-five cents per hour for processing labor, thus causing it to move into an open, free and competitive market at a serious disadvantage to the tobacco produced by those fortunate enough to own their own processing

by those fortunate enough to own their own processing plants, and whose labor for processing is specifically exempt t

from the provisions of the act.

8(a) Defendants allege that during the year 1950 within one airline mile contiguous to the town of Quincy, in Gadsden County, Florida, there was actually planted, cultivated and grown more than 185 acres of U.S. Type 62 shade leaf tobacco, and that this acreage produced approximately 235,000 pounds of such tobacco. Defendants allege that the act does not authorize the administrator to define an area to be outside the area of production when in truth and in fact it actually is within the area of production, as has been alleged, and that the definition of the administrator is physically and actually untrue when applied to U.S. Type 62 shade leaf tobacco and its production in and about the town of Quincy, in Gadsden County, Floridal that his definition exceeded the authority granted to him, is violative of the purpose and intent of the act and the purpose and intent of Congress in the enactment of the act

into law so that the definition of the term, "area of production", as applied to the town of Quincy, Gadsden County, Florida, is invalid and illegal.

XI

For further answer to the plaintiff's Bill of Complaint, these defendants allege as follows:

1. That they have not, nor have they through their employees or by any one employed by them engaged in the production, sale or distribution of tobacco, but allege that any and all tobacco processed in the packing house of the defendants for the years 1950 and 1951 has been processed by the particular farmer owning such tobacco under several contracts with the defendants, said contracts being with the following named farmers who grow the number of acres listed opposite their respective names as follows:

Name—Address	**	No. of Acres
C. C. Duke, Fowlstown, Ga		6 .
T. W. Fletcher, Rt. 3, Quincy; Fla.		2
Gregory Brothers, Havana, Fla		3
Glenn Grifith, Calvary, Georgia		7
A. M. Haire, Greensboro, Fla		3
Carl Haire, Greensboro, Fla		4
Drew Haire, Gretna, Fla		8 .
P. J. Hammett, Cairo, Ga		2
Leo Harrison, Whigham, Ga		3
G. J. Hires, Greensboro, Fla		5
A. F. Hopkins, Calvary, Ga		$1 \ 1/2$
M. J. Johnson, Rt. 3 Cairo, Ga		3
Jones & Watson, Whigham, Ga		4
W. C. Jones, Whigham, Ga.	,	5
Rubin Jordan, Rt. 3, Quincy, Fla		1 1 2
Glover Kemp, Havana, Fla		1/2/10
Ellis Maxwell, Rt. 3, Cairo, Ga		4
G. A. Maxwell, Calvary, Ga		2
Jack McFarlin, Quincy, Fla		7 .
H. L. McKeown, Quiney, Fla.		0. 18
Lige McMillan, Chattahoochee, Florid	a	3
F. W. McNair, Whigham, Ga		1
Joe McNair (White), Calvary, Ga.		1
Joe McNair (Colored), Hayana, Fla		2
Raymond Poppell, Concord, Fla		2
L. O. Rahberg, Cairo, Ga		1 1/4
O. W. Rowan, Greensboro, Fla.		2 ,
J. G. Rudd, Quincy, Fla.	• • • • • • • • • • • • • • • • • • • •	0
Tyler Sanders, Route 3, Quincy		4
		9.4

» Name—Address			· No. of	Acres
Jeff Shelfer, Quincy, Fla.			:30	
Charles B. Smith, Havana, Fla.			3	
John B. Smith, RD, Quincy, Fla.			2 1 2	
W. B. Smith, Havana, Fla			3.34	
Spooner Farms, Greensboro			20	
(Mariay Epamier)		•		
Howard Suber, Quincy			G	
Marvin Suber, Rt. 3, Quincy			7 1,2	
Worth Suber, RD, Quincy			10	
W. T. Suber, Jr., Cairo, Ga)	
Geo. C. Thomas, Jr., Cairo, Gal.			3	*
C. T. Vanlandingham, Greensbor	0		3	4 4
C. D. Vickers, Whigham, Ga			2	
C. T. Williams, Calvary, Ga			3	
A. M. Womack, Havana			()	
. 52 farmers			$263 = 2 \cdot 10$	acres

Each of said farmers has executed a contract with the defendants for the processing of their 1950 tobacco crop, a specimen copy of which contract is hereto attached and marked Appendix 2, and by this reference thereto hereby made a part hereof.

2. That said tobacco is not salable or marketable until the process and treatment as extlined in Paragraph X hereinabove is completed. Defendants access that from time to time as the tobacco of each particular farmer is delivered to the defendants warehouse in Quincy for processing, an accurate record upon an hourly or proportionate basis was kept, and the amount of time and expense acciuing as a result of the processing of the tobacco of each farmer is kept and the exact tost of such processing charged to such

farmer, and an account thereof made available to him. As said tobacco was and is delivered by the farmer for processing, it was and is divided into various primings and kept separate in the bulks by partitioning the different crops, primings, and owners with straps so that each farmer's tobacco can be identified at any time during the entire processing period while aid tobacco is in the defendants' warehouse. After the processing has been completed, the tobacco is reported for sale under the control of the farmer; he may himself sell at or have it sold by the defendants for a commission; he has the right to accept or reject any offers as are made for it, or to make such sales to such buyers as he chooses of have the same sold in his behalf.

3. That the procedure outlined hereinabove constitutes a practice performed by a farmer as an incident to and in conjunction with his farming operations including preparation for market, delivery

to storage or to market, and that under Section 13(a)(6) and Section 3(f) of the Fair Labor Standards Act, such operation and the employees engaged therein are exempt from the coverage of the act.

Defendants, therefore, of this Court humbly pray that it take jurisdiction of this cause, that it take such evidence as will be necessary to the issues raised by the complaint and this answer, and that upon a final hearing it enter a final decree dismissing the complaint filed herein by plaintiff.

Respectfully submitted.

(S.) JULIUS F. PARKER,
Of CALDWELL, POTTER, FOSTER & WIGGINSON,
Attorneys for Defendants.

44 Certificate of Service (omitted in printing).

IN UNITED STATES DISTRICT COURT

REQUEST FOR ADMISSION OF FACTS Filed October 24, 1951

In accordance with the requirements of Rule 36, Federal Rules of Civil Procedure, plaintiff is hereby respectfully requested to admit in less than ten days after service of this request upon him the following facts:

The Type 62 tobacco is a leaf tobacco grown and used exclusively for eigar wrappers, and that the only places in the world where this tobacco is grown exclusively are two small compact areas, one of which is Madison County, Florida, (which is not involved in this litigation) and Gadsden and Leon Counties, Florida. Gadsden and Leon County are contiguous and Type 62 tobacco grown in these counties is grown within an air line mile radius to the town of

Quincy, Florida. All of the tobacco grown in Madison County
is packed in that county and will be disregarded in this request, although the similarity between the conditions existing
in Madison County, Florida, and those existing in Gadsden County,
Florida, is so great that the decision in this cause will probably affect each in the same fashion.

2. That Page 62 tobacco, requires special and painstaking cultivation, curing and preparation for market. It is grown in fields enclosed in a cheesecloth shade which completely covers and encloses the tobacco field. The shade cloth is supported by wires strung on posts placed at regular intervals throughout the Field. When each leaf of tobacco reaches a certain state of maturity it must immediately be harvested. This harvesting process is known and described as "priming". The lower leaves are picked first, perhaps two or three from each tobacco stalk. This picking is

repeated as the tobacco matures on up the stalk until the operation has been repeated six or seven times. The picking is designated as first primings or sand leaves, second primings, thard primings, and, so on. At each priming, the tobacco is immediately taken into a tobacco barn leaved on the farm, where it is strung on streks and dried by means of heat. The tobacco is completely, or almost completely dried, then permitted to absorb moisture and again dried. The drying process is repeated until the tobacco has reached an appropriate stage in the process of curing. There may be several primings in a single barn at one time, but as each priming reaches, the appropriate stage of maturity it must immediately be packed in boxes and taken to the processing warehouse to be processed and prepared for market as hereinafter described. Unless the tobacco

46 rot or deteriorate and become valueless for any purpose.

3. From the tobacco barns tobacco must be promptly taken to the packing or processing warehouse, where it is placed in piles known as buiks", consisting of and requiring from 3,500 to 4,500 pounds of tobacco, as any lesser amount will not retain and generate sufficient heat for the sweating process. As this stage is reached, the tobacco has absorbed a sufficient amount of water so that fermentation begins and a sweating process takes place and a natural heat created. During this stage, the temperature within the bulks is closely watched and observed each day and from six to eight days thereafter depending upon the temperature rise (that is the temperature of the tobacco itself), the bulk is turned, that is to say, the bulk is broken up, the tobacco shaken out, the tobacco onthe outside placed on the inside, that on the top is placed on the bottom, and vice versa, until through this process of fermentation the tobacco is in a condition in which it may be handled or worked. At this stage, the tobacco is then separated, graded, kased (sprayed with water) and again placed in bulks where the sweating and fermentation processes and the turning of the bulk continues until such time as the tobacco is in condition to be balled and ready for market. In all of this handling, nothing is added to or taken from the tobacco except through the natural processes of evaporation and fermentation except sprinkling with water, or "kasing". Any delay in the continuation of the treatment from the time the tobacco . is picked from the stalk, or "primed" as above indicated until if is baled is dangerously, likely to result in such damage or fer riotation of the tobaccoas to make it unsalable for any purpose. That the bulking and handling to be successfully, efficiently and economically carried out requires a tremendously large amount of valuable and expensive equipment, including a steam heated packing house equipped with humidifying sprays, bulking plat-

forms, kasing machinery and sprays, thermometers and thermom-

eter tubes, bulk covers, baling boxes and presses, wax paper, baling mats, packing, sorting, and grading tables and, above all, the ability and knowledge of the processing, gained only through experience. All of the above cannot be economically owned or had except by farmers owning and growing at least a hundred acres of tobacco a year or more.

- 4. It is admitted that within 30 air line miles of Quincy, in Gads-den County, Florida, there are approximately 300 farmers growing Type 62 tobacco, of which 80% grow less than 25 acres per year, and the majority of which grow from 1½ to 10 acres per year, and that approximately 3,500 to 4,000 pounds of tobacco are required to form an adequate bulk for the sweating of tobacco. Assuming a farmer to possess the necessary equipment, knowledge and trained personnel to process his own tobacco, it would require the tobacco from at least acres to form an adequate bulk of each primings. The processing or handling of the tobacco requires considerable skill and experience in order to successfully do it.
 - 5. The town of Quincy, Florida, has grown up and around, and been supported by and exists almost solely by virtue of the agris-cultural products grown in its surrounding community. The principal, and almost sole source of income to the town of Quincy.
- is from the raising of Type 62 tobacco. There are few industries or businesses of consequence in Gadsden County which do not have their roots in tobacco farming and other agricultural activities. The population of the town of Quincy, according to the 1950 United States census is 6,586. The growing of Type 62 tobacco and the handling or packing of this tobacco are complementary seasonal operations; that is to say, during the first half of the year the tobacco is being grown and during the latter half of the year it is being processed and prepared for market. The labor for both operations is drawn from the same labor source exclusively. That the workers who are engaged in the processing and preparation of the tobacco for market are essentially the same labor which grew it on the farms. That this same labor for the most par' lives year round on the farms in tenant houses furnished rent tree by the owners of the farm. In addition to the housing facilities, the labor is furnished free water and a farm plot on which they may raise their own vegetables and a limited amount of livestock. That transportation is furnished to them from their homes to their places of work, and return. Those living in Quincy are transported to the farms during the farming season, and those living on the farms are transported to the packing houses during packing season. That to all intents and purposes the farm labor and packing house labor in the Quincy area are identical.
- 6. The Administrator under the Fair Labor Standards Act has, by his definition of area of production as applied to tobacco ex-

cluded any processing plant, and the employees thereof from the "area of production", if the processing plant is located within one mile of a town having a population of 2,500 and not more than 50,000. This definition as applied to Quiney has ereated a situation whereby employees at one packing house are held to be covered by the Act, while other persons doing the identical work in another packing house a few blocks away are held not to be covered if the packing house is owned by the farmer who grew the tobacco which is being processed. That if a farmer lowns his own warehouse and processes his own tobacco that the Administrator concedes he is not covered by the Act, but if he undertake? to process the tobacco of other growers, then upon the beginning and until the completion of the processing for other growers he is contended by the Administrator to be covered by the Act. That the application by the Administrator of the term, farea of production", as applied to Type 62 shade grown leaf tobacco and the town of Quincy, Florida, results in the tobacco of the small farmer being burdened with an extra twenty-five cents per hour for processing labor and that it must move into an open, free and competitive market at a serious disadvantage to the tobacco produced by those who own their own plants and do their processing therein.

7. That during the year 1950, within one air line mile contiguous to Quincy, Gadsden County, Florida, (being an area within which the Administrator says is outside the area of production) there was actually planted, cultivated and grown more than 185 acres of U.S. Type 62 shade leaf tobacco, and that this acreage produced approximately 235,000 pounds of such tobacco, which was likewise processed within the town of Quincy, or one air line mile contig-

uous thereto.

50 - 8. That the defendants are paying labor engaged in the processing of tobacco in their plant or warehouse only fifty cents per hour, and that the minimum rate required by the Fair Labor Standards Act is seventy-five cents per hour.

9. That the following named farmers, who grow the number of acres of Type 62 tobacco listed opposite their names, to-wit:

Name—Address No. of Acres	
C. C. Duke, Fowlstown, Ga	
T. W. Fletcher, Rt. 3, Quincy, Fla.	
Gregory Brothers, Havana, Fla. 13	
Glenn Grifith, Calvary, Georgia	
A. M. Haire, Greensboro, Pla.	
Carl Haire, Greensbaro, Fla.	
Drew Haire, Gretna, Fla.	
P. J. Hammett, Cairo, Ga.	
Leo Harrison, Whigham, Ga. 3	
G. J. Hires, Greensboro, Fla	

Name—Address	No. of Acres
A. F. Hopkins, Calvary/Ga.	1 1/2
M. J. Johnson, Rt. 3, Cairo, Ga.	_3
Jones & Watson, Whigham, Ga:	4
W. C. Jones, Whigham, Ga.	5
Rubin Jordan, Rt. 3, Quincy, Fla	1 1/2
Glover Kemp, Havana, Fla	1 2/10 @
Ellis Maxwell, Calvary, Ga.	2
G. A. Maxwell, Rt. 3, Cairo, Gat.	. 4:
Jack McFarlin, Quincy, Fla.	7
11. 12. MCREOWII, Camey, Fla.	10
Lige McMillan, Chattahoochee, Florida	3
F. W. McNair, Whigham, Ga.	1
Joe McNair (White), Calvary, Ga.	4
Joe McNair (Colored), Havana, Fla	2 :
Raymond Poppell, Concord, Fla	2
\51	
A C D II C C	* * /4.*
L.O. Rahberg, Cairo, Ga	1 1/4:
O. W. Rowan, Greensboro, Fla.	2
J. G. Rudd, Quincy, Fla.	3
Tyler Sanders, Route 3, Quincy Jeff Shelfer, Quincy	30
Charles B. Smith, Havana, Fla.	2
John B. Smith, Rfd., Quiney, Fla.	2 1/2
W. B. Smith, Havana, Fla.	3 3/4
Spooner Farms, Greensboro	20
(Murray Spooner)	
Howard Suber, Greensboro	6
Marvin Suber, Rt. 3, Quincy	7 1/2
Worth Suber, Quincy	. 10
W. T. Suber, Jr., Cairo, Ga	5
Geo. C. Thomas, Jr., Cairo, Ga	3
C. T. Vanlandingham, Greensboro	3
C. D. Vickers, Whigham	2
C. T. Williams, Calvary, Ga.	3
A. M. Womack, Havana	9
	200 2110
52 farmers	$263 \ 2/10$

did execute a contract with the defendants for the processing of their 1950 tobacco crop and will execute similar contract for their 1951 tobacco crop and that a copy of the contract which is attached to the answer of the defendants, marked Appendix 2, is a true and exact copy of the contracts executed by said farmers with the defendants. That Type 62 shade leaf tobacco is not salable or marketable until the process and treatment outlined hereinbefore is completed. From time to time as the tobacco of each farmer is delivered to the warehouse for processing, it is divided into various primings and kept separate in the bulks by partitioning the different

crops, primings and owners with straps, with an accurace record upon an hourly or proportionate basis being kept, and that a record is also kept of the amount of time and expense accruing as a result of the processing, and an account made available to the farmer. But the tobacco of each farmer can be identified at any time while it is in the warehouse of the defendants. After the processing has been completed the tobacco is reported for sale under the control of the farmer; that the tobacco may be sold by the farmer, or have it sold by the defendants for a commission. That the farmer has the right to accept or reject any offers made for it, or make such sales to such buyers as he chooses, or to have the same sold by others in his behalf:

10. The existence of Joseph T. Budd, Jr., and Florence W. Budd, co-partners doing business as J. T. Budd, J., and Company.

11. That there are approximately 108 workers employed during the processing season in defendants' warehouse.

CALDWELL, PARKER, FOSTER & WIGGINTON.

By (S.) Julius F. Parker, Attorneys for Delendants.

.- Certificate of Service (omitted in printing)

IN UNITED STATES DISTRICT COURT

ORDER ON PRE-TRIAL CONFERENCE—November 1/ 1951

This cause came before this Court for pre-trial conference, at which time the pleadings were reviewed and a general discussion of the issues involved was submitted by counsel for the respective parties to the Court. During the pre-trial conference the attorneys for defendants moved the Court to allow them to file an anrendment to the request for admissions of fact, the original of which had already been served on plaintiff. The attorneys for plaintiff moved for a period of thirty days from the date of the service upon plaintiff of such amended request for admissions of fact within which to comply with Rule 36 of the Federal Rules of Civil Procedure.

Since it appears that the pleadings are not in the final form desired by parties and that an extension of time beyond the rule has been requested for plaintiff to answer the amended request for admissions of fact after it is served, and that the defendants defire to amend their answer, it is, upon consideration thereof.

Ordered, Adjudged And Decreed that defendants be, and they are hereby granted permission to file an aniended answer in this eause and amended request for admissions of fact. I Plaintiff, Maurice J. Tobin, is allowed thirty days from the date of the service upon his

counsel of the amended request for admissions of fact within which to comply with Rule 36 of the Federal Rules of Civil Procedure,

and it is further

Ordered, Adjudged And Decreed that after the amended answer is filed and the amended request for admissions of fact has been served either party, of both, may apply to the Court for a hearing on a final pre-trial conference to determine the issues, and for such other purposes as may be consistent with Rule 16 or the Federal Rules of

Civil Procedure.

Done And Ordered in Chambers in the Federal Courthouse in Tallahassee, Florida, this 1st day of November, A. D. 1951.

(S.) Dozier A. DeVane, District Judge.

IN UNITED STATES DISTRICT COURT

Second Amended Answer-Filed November 1 1951

Come now defendants, by their undersigned attorneys, and for their second amended answer to the complaint filed herein, allege as follows:

1. Answering Paragraph 1; defendants deny that they are violating Section 15(a)(1), Section 15(a)(2), or Section 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, C. 676, 52 Stat. 1060; USCA Title 29, Section 201, et seq.), as amended by the Fair Labor Standards Act of 1949, approved October 26, 1949 (Public Law 393, 81st Congress, First Session, 63 Stat. 910), hereinafter called the "Act".

2. Defendants admit the provisions of Section 17 of the Act, but deny that they have violated the designated provisions of Section 15 cited by the plaintiff so as to entitle plaintiff to an injunction

3. Defendants admit all of the allegations of Paragraph III of the complaint, except the allegation that they are engaged in the production, sale and distribution of tobacco, which they deny.

4. Defendants admit that there are employed approximately 108 workers in their warehouse in Quiney, Florida, but defendants deep that the workers are employed by them and allege that said workers are employed by the farmers whose names are hereinafter set out to perform purely agricultural services upon shade grown leaf tobacco as a necessary, requisite for its preparation for market in its raw or natural state as an incident to agriculture, and that the defendants act solely as agents for such farmers, the complete details of which will be set forth in more complete detail in this second amended answer.

Defendants deny that they are entaged in the production of tobacco for interstant commerce within the meaning of the Acts
Defendants deny that substantial quantities of goods are produced;
by the alleged 108 employees (since delepidants deny that the said
employees produce goods in interstate commerce and deny that said
employees are covered by the Acts, and likewise deny that said
goods have been delivered; transported, offered for transportation
and sold for interstate commerce and shipped or delivered, or sold
with knowledge that shippient, delivery or sale thereof is intended
from defendants place of business to other states so as to bring
either the defendants or the alleged employees within the coverage
of the Act. Defendants deny that the Act applies to them, or to
the 108 employees referred to upon either the factual situation of
their employment or the type of service they perform, all of which
will be specifically set forth later in this amended answer.

57 5. Defendants deny that they have repeatedly violated and are violating the provisions of Section 6 and 15(a) (2) of the Act by paying to many of their employees for their employment in the production of goods for interstate commerce wages at less than 75c per hour during the period since January 25, 1950. Defendants admit that the rate paid by them for the farmers hereinafter named since said date has been less than 75c an hour, but allege that said employees of the farmers engaged in an operation incidental to agriculture or in the preparation of an agricultural commodity in its raw or natural state for market, and that neither the work performed nor the employees are covered by any provision of the act or by any lawful regulation adopted under the authors, thereof, all of which will fully appear from the facts concerned the business of the defendants and work of the said 108 employees as will be later set forth in full.

6. Defendants admit the allegations of Paragraph VI, but deny that they have violated any of the regulations described in said paragraph, since neither defendants nor said employees are covered by the Act.

7. Defendants deny that they are employers subject to the Act and, therefore, dengethat they have violated, or that they are violating the provisions of Section 11(c) and 15(a) (5) in that they have failed to make, keep and preserve adequate records of their employees and the hours and other conditions and practices of employment maintained by them as required by the alleged regulation in that the records kept by defendants fail to show, among other things, home addresses and occupations with respect to many

58 comployees and the time of day and the work day on which the employment work-week began.

8. Defendants deny that they have repeatedly yielated, and are violating the provisions of Section 15(a) (1) of the Act in that since

February 15 1950, they have shipped, delivered and transported, offered for transportation and sold for interstate commerce, or have shipped, delivered or sold with the knowledge that shipment, delivery or sale thereof in interstate commerce was intended from their said place of business to other states, the goods and the production of which many of their employees were employed in violation of Section 6 of the Act as alleged, since defendants deny that either they or their alleged employees are covered by the Act.

9. Defendants deny that they have repeatedly violated provisions of the Act specified in the complaint. Defendants further deny that a judgment enjoining and restraining alleged violations set forth in the complaint is authorized by Section 17.01 the Act.

10. Further answer plaintiff's bill of complaint, the defendants blege as follows:

1. That United States Type 62 tobacco is a leaf tobacco grown and used exclusively for igar wrappers, and the only place in the world where this particular tobacco is grown extensively and successfully is in two limited, small compact areas, one of which is in Madison County, Florida, and which constitutes a separate and distinct area of production for such tobacco, and the other of which consists of Decatur and Grady Counties, Georgia, and Gadsden and

Leon County, Florida. All the latter counties are contiguous and Type 62 tobacco grown in said counties is grown within an airline radius of 30 miles of the town of Quiney, in Gadston County, Florida. All of the tobacco grown in Madison County, Florida, is packed in said county, and therefore, it is a separate area of production from the Quincy area, and to avoid confusion, for the purpose of this answer, it will be disregarded, although what is said herein with reference to unreasonableness and invalidity of the administrator's definition of area of production as applied to the Quincy area of production is equally applicable to Madison County. A copy of the definition of the Administrator of "area of production" is attached hereto marked Appendix 1.

2. Type 62 tobacco requires peculiar, special and painstaking cultivation, curing, and preparation for market. It is grown in fields enclosed with a cheesecloth shade which completely covers and encloses the tobacco field. The shade cloth is supported by wires strung on posts placed at regular intervals throughout the field. When each leaf of tobacco reaches a certain state of maturity it must immediately be harvested. This harvesting process is known and described as "priming". The lower leaves are first picked, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures on up the stalk until the operation has been repeated six or seven times. The picking is designated as first primings or sand leaves, second primings, third primings, and so on. At each priming the tobacco is immediately taken into a

tobacco barn, located on the farm, where it is strung on sticks and dried by means of heat. The tobacco is completely, or almost,

completely, dried, then permitted to absorb moisture and again dried. The drying process is repeated until the tobacco. has reached an appropriate stage in the process of curing. There may be several primings in a single barn at one time, but as each priming reaches the appropriate stage of maturity, it must immediately be packed in boxes and taken to the warehouse to be further handled in its raw or natural state and prepared for market as hereinafter described. Unless the tobacco is immediately handled as hereinafter outlined, it will spot, rot or deteriorate and become

valueless for any purpose. ..

. . . 3. From the tobacco barns tobacco must be promptly taken to the · warehouse where it is placed in piles, known as bulks, consisting of and requiring from 3,500 to 4,500 pounds of tobacco, as any lesser amount-will not generate and retain sufficient heat for the sweating process. At this stage the tobacco has absorbed a sufficient amount of water so that fermentation begins and a sweating process takes planand anatural heat created. During this stage the temperature within the bulk is closely watched and observed each days and from six to eight days thereafter, and depending upon the temperature rise, the bulk is turned; that is to say, the bulk is broken up, the tobacco shaken out, the tobacco on the outside is placed on the inside, that on the top is placed on the bottom, and vice versa, until through this natural sweating or fermentation the tobacco is in a condition in which it may be handled or worked. At this stage the tobacco is then separated, graded, kased (sprayed with water) and again placed in bulks where the sweating and fermentation processes and the turning of the bulk continues until such time as the tobacco is in a condition to be haled and ready for market. In all of this handling, nothing is added to or taken from the tobacco except through the natural processes of evaporation and fermentation. Any delay in the continuity of the treatment from the time the tobacco is picked from the stalk, or "primed" as above indicated, until it is baled is dangerously likely to result in such damage or deterioration of the tobacco as to. make it unsalable for any purpose.

4. That the bulking and handling as above outlined to be succossfully, efficiently and economically carried out requires a tremendously large amount of valuable and expensive equipment. including a steam heated packing house equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, bulk covers, baling-boxes and presses. wax paper, baling mats, packing, sorting, and grading table, and, above all, the ability and knowledge of the process gained only through experience. All of the above cannot be economically owned

or had except by farmers owning and growing at least 100 acres of tobacco a year or more.

5. In the Quincy area of production there are approximately 300 farmers growing Type 62 tobacco, of which 80% grow less than 25 acres per year, and the majority of which grow from 1½ to 10 acres per year. As alleged above, approximately 4,000 pounds of tobacco are required to form an adequate bulk for the sweating of tobacco. Assu ting a farmer to possess the necessary equipment, knowledge and the trained personnel to prepare his own tobacco.

for --rket it would require the tobacco from at least 65 acres to form an adequate bulk of each priming. Thus, it is imperative that the smaller farmer utilize the services and facilities of an established warehouse in order that his tobacco may

be prepared for market.

6. The town of Quincy, Florida, has grown up around, is supported by, and exists solely by virtue of the agriculture in it and the surrounding community. The principal, and almost sole source of cash income to the town of Quincy is from the raising of Type. 62 tobacco. There are few industries or businesses of consequence in Gadsden County which do not have their roots in tobacco farming and other agricultural activities. Population on the town of Quincy, according to the 1950, United States census, is 6,586. The growing of United States Type 62 tobacco and the handling or packing of this tobacco are complementary seasonal operations; that is to say, during the first half of the year the tobacco is being : grown and during the latter half of the year it is being prepared for market. The labor for both operations is drawn from the same labor source almost exclusively. The workers who are engaged in the preparation of the tobacco for market is the same labor which grows it on the farms. This farm labor, for the most part, lives all year round of the various farms in tenant houses furnished rent free by the owner of the farm. In addition to the house, this labor. is furnished free water and a farm plot on which they may raise their own vegetables and a limited amount of livestock. portation is furnished them to their places of work and return,

Those living in Quiney are transported to the farms during the farming season, and those living on the farms are transported to the packing houses during packing season. To all intents and purposes the farm labor and the packing house labor in the Quiney area are identical.

7. Under Section 13(A)(10) of the Fair Labor Standards Act, Congress specifically exempted from the operation of said Act, any individual employed within the area of production (as defined by the Administrator) employed in the handling, packing, storing, compressing, drying, or preparing in their raw or natural state of agricultural or horticultural commodities for market. In authorizing

the administrator to define the area of production, it was contemplated by Congress that a practical and realistic definition of area of production would be prescribed by the Administrator which would carry out the intent of Congress to exempt from the operation of the Act any employee employed in agriculture, including farming in all its branches, and any practices performed by a farmer as incident to or in conjunction with farming operations, including preparation for market and thereby avoid the impact of the minimum wage and hour provisions on farm labor.

8. The administrator has by his definition of area of production; as applied to tobacco, excluded any packing plant and the employees thereof from such area of production, if the same be located within one mile of a town with a population of 2.500 and not more than 50.000; such definition as applied to the facts hereinabove alleged, is capricious, arbitrary, not based on logic or reason, not within the authority contemplated by the Act and is, therefore, unreasonable and illegal. As a result of this, there has been created

a confused economy and the economic anomaly whereby employees at one packing house are held to be covered by the act. while the same persons doing the identical work in a packing house a few blocks away are held not to be covered. An even more ridiculous situation exists where an employee is a grower who packs, his own tobacco and also the tobacco of other growers and is required to comply with the act as to the employees who work in one packing house and not those who are employed in another. As a matter of fact and reason, and within the meaning and intent of the act, the packing house of these defendants is located within the area of production of the tobacco handled therein and, therefore, these defendants and their employees are exempt from the operation of the Act. The arbitrary, capricious, illegal invalid and unconstitutional definition by the Administrator of the term, "area of production" as applied to Type 62 shade grown leaf tobacco (if applied as the plaintiff contends) results in the tobacco of the small farmer being saddled with an extra twenty-five cents per hour for processing labor, thus causing it to move into an open, free and competitive market at a scrious-disadvantage to the tobacco produced by those fortunate enough to own their own packing plants or warehouses, and whose labor for processing is specifically exempt from the pro-Visions of the Art.

8. (a). Defendants allege that during the year 1950 within one airline anile contiguous to the town of Quincy, in Gadsden County. Florida, there was actually planted, cultivated and grown more than

185 acres of Type 62 shade leaf tobacco, and that this acreage produced approximately 235,000 pounds of such tobacco. Defendants allege that the Act does not authorize the Administrator to define an area to be outside the area of pro-

duction, when in truth and in fact it actually is within the area of production, as has been alleged, and that the definition of the Administrator is physically and actually untrue when applied to Type 62 shade leaf tobacco and its production in and about the town of Quincy, in Gadsden County, Florida; that his definition exceeded the authority granted to him, is violative of the purpose and intent of the act, and the purpose and intent of Congress in the enactment of the Act into law so that the definition of the term, "area of production", as applied to the town of Quincy, Gadsden County, Florida, is invalid and illegal.

8(b). Defendants allege that in the preface contained in Title 29. Chapter V, Code of Pederal Regulations, Part 536, entitled Definition of Area of Production, defining the term, "Area of Production" pursuant to Section 7(c) and 13(a) (10) of the Fair Labor Standards Act of 1938, it is stated:

"Six hearings with respect to proposed definition of 'area of production' were held during 1944 and 1945 covering the industries converned with: (1) fresh fruits and vegetables; (2) cetton; (3) to-bacco; (4) grain, seeds, dry edible beans and dry edible peas; (5) dairy products, poultry and eggs; and (6) miscellaneous agricultural and horticultural commodities not covered by other hearings. All parties appearing at the hearings were given an opportunity to be heard, to question witnesses and to file briefs and additional statements subsequent to the hearings. Distance and population criteria formed the basis for substantially all of the definitions proposed at the hearings."

Defendants allege that none of the producers of U.S. Type 62 shade leaf tobacco were ever given any notice of a hearing and from lack of such notice none of said producers appeared at the hearing and presented the factual situation as it related to Gadsden County, Florida, and defendants further allege that in the preparation of the definition of the term, "area of production", as used in Section 13(a) (10) of the Fair Labor Standards Act, the Administrator did not consider any of the facts or circumstances relating to either the growth, production or preparation for market of U.S. Type 62 tobacco as it is grown, handled or prepared for market in Gadsden County, or Quincy, or Madison County, Florida, which are the only areas of production for this tobacco in America.

Defendants further allege that the American Sumatra Tobacco Corporation, in and around Quincy, and within 50 miles thereof, grows approximately 1,250,000 pounds of tobacco per year, a major portion of which is prepared in its raw or natural state for market in warehouses belonging to the American Sumatra Corporation, and which are located in the heart of the town of Quincy, but that by virtue of the provisions of Section 13,a)(6) of the Fair Labor Standards Act, the employees of American Sumatra who prepare.

such tobacco for market in its raw or natural state are exempt from the provisions of the Act. Defendants likewise allege that King.

Edward Tobacco Company produces several hundred thousand pounds of Type 62 shade leaf tobacco in Galsden County, all of which is prepared for market in its raw or natural state in warehouses in Quincy, Gadsden County, Florida, and

that such operation is likewise exempt from the Act.

Defendants likewise alloge that King Edward Tobacco Company's prepares in its raw or natural state for market U.S. Type 62 tobacco for other farmers who are unable to maintain warehouses and that when it processes the tobacco of other farmers, the Ada

ministrator contends that it is covered by the Act.

Defendants, allege that the warehouses engaged in these operations are located within the city limits of Quincy, Florida, or one airline mile contiguous thereto; that approximately 2% of the growers of U. S. Type 62 shade leaf tobacco in Gadsden County, Florida, including American Sumatra Corporation, produced as. farmers approximately 40% of this type tobacco grown in the area whose employees are exempt under the provisions of Section 13(a)(6) of the Fair Labor Standards Act; that the tobacco of said growers, therefore, enters a free and competitive market. with a 25c per hour lower labor cost for the labor required in the warehouses for the preparation of their tobacco in its raw and natural state for market, than does the tobacco of the independent small farmers whose employees are subject to the requirements of the Act under the definition promulgated by the Administrator. Defendants allege that the result of this anomalous situation in connection with the labor that is essential and necessary for the growth and preparation for market of U. S. Type 62 tobacco in

Gadsden County, Florida, is leading towards a monopoly in the hands of a few financially independent growers and the strangulation economically of the small producers in the area and that this result is in violation of the spirit and intent of the Eair Labor standards Act, all of which results from the arbitrary action of the Administrator in seeking to apply his definition of the term, "area of Production", assused in Section 13(a)(10) to the town of Quincy so as to exclude the town of Quincy, and one air-line mile thereof from the "area of production" of C. S. Type 62 shade teaf tobacco, despite the fact that approximate 235,000 pounds of such tobacco is actually grown within those limits each

11. Further answering plaintiff's bill of complaint, these defendants allege:

1. That they have not nor have they through their employees or by any one employed by them engaged in the production, sale or distribution of tobacco, but allege that any and all tobacco processed a

in the packing house of the defendants for the years 1950 and 1951 has been processed by the particular farmer owning such tobacco under several contracts with the defendants, stud contracts being with the farmers listed on Appendix 2 of this second amended answer, who grow the number of acres listed opposite their respective names.

Each of said farmers listed on Appendix & has executed a contract with the defendants for the processing of their 1950 tobacco crop, a specimen copy of which contract is hereto attached and marked

Appendix 3.

2. That said tobacco is not salable or marketable until it has received the handling and treatment as outlined in Paragraph 10 above is completed. Defendants allege that from time to time as the tobacco of each particular farmer is delivered. to the defendants' warehouse in Quiney to be prepared for market an accurate record upon an hourly or proportionate basis was kept. and the amount of time and expense accruing as a result of the handling of the tobacco of each farmer is kept and the exact cost of such handling charged to such farmer, and an account thereof made available to him. As said tobacco was and is delivered by the farmer for market preparation, it was and is divided into primings and kept separate in the bulks by partitioning the different crops, primings, and owners, with straps so that each farmer's tobacco can be identified at any time during the entire handling period while said tobacco is in the defendants' warehouse. After the handling has been completed, the tobacco is reported for sale under the control of the farmer; he may himself sell it or have it sold by the defendants for a commission; he has the right to accept or reject. any offers as are made for it, or to make such sales to such buyers as he chooses, or have the same sold in his behalf.

3. That the procedure outlined hereinabove constitutes a practice performed by a farmer as an incident to and in conjunction with his farming operations including preparation for market, delivery to storage or to market, and that under Sections 13(a) (6), 13(a) (10) and Section 3(f) of the Fair Labor Standards Act, such operation

and the employees engaged therein are exempt from the

70 coverage of the Act.

Defendants, therefore, of this Court humbly pray that it take jurisdiction of this cause, that it take such evidence as will be necessary to the issues raised by the complaint and this second amended answer, and that upon a mall hearing it enter a final decree dismissing the complaint hereinbelove filed by plaintiff.

Respectfully admitted.

Of Caldwell, Rarker, Foster & Wigginton,
Attorneys for Defendants.

I hereby certify that I have this day served a copy of the foregoing Second Amended Answer on Beverly R. Worrell, Regional Attorney, Office of the Solicitor, U.S. Department of Labor, 1908 Comer, Euriding, Bunningham 3, Alabama, and Office of the Solicitor, U.S. Department of Labor, Peachtree-Seventh Building, Atlanta, Georgia, by mail, this 1st day of November, A. D. 1951

Of Cardwell, Parker, Foster & Wigginston,
Attorneys, for Defendants

IN UNITED STATES DISTRICT COURT

AMENDED REQUEST FOR ADMISSION OF FACTS - Filed November 1, 1951

In accordance with the requirements of Rule 6, Federal Rules of Civil Procedure, plaintiff is hereby respectfully requested to admit in less than 30 days after service of this amended request upon him the following facts:

1. That Type 62 shade leaf tobacco is a tobacco grown and used exclusively for eight wrappers, and that the only places in the world where this tobacco as grown exclusively are two small compact areas, one of which is Madison County. Florida, (which is not involved in this litigation) and Gadsden and Leon Counties, Florida, Gadsden and Leon Counties is grown within an air line mile radius to the town of Quincy, Florida, (All of the tobacco grown in Madison County is packed in that county and will be disregarded in this request, although the similarity between the conditions existing in Madison County, Florida, and those existing in Gadsden County. Florida, is so great that the decision in this cause will probably affect each in the same fashion.)

2 That Type 62 tobacco requires special and painstaking cultivation, curing and proparation for market. It is grown in helds enclosed in a checsceleth shade which completely covers and encloses the tobacco liebt. The shade cloth is supported by wirestrong on posts placed at regular intervals throughout the

field. When each leaf of tobacco reaches a certain stage of maturity it must immediately be harvested. This harvesting process is known and described as 'printing'. The lower leaves are picked first, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures on up the stack until the operation has been repeated six or seven times. The picking is designated as first primings or sand leaves, second primings, third primings, and so on. At each priming, the tobacco is immediately taken into a tobacco barn located on the farm, where it is string on sticks and dried by means of heat. The tobacco is completely, or

almost completely dried, then permitted to absorb moisture and again dried. The drying process is repeated until the tobacco has reached an appropriate stage in the process of curing. There may be several primings in a single barn at one time, but as each priming reaches the appropriate stage of maturity it must immediately be packed in boxes and taken to the warehouse in its raw or natural state to be prepared for market as hereinafter described. This spot, rot or deteriorate and become valueless for any purpose

3. From the tobacco harns tobacco must be promptly taken to the packing warehouse, where it is placed in piles known as "bulks" consisting of and requiring from 3.500 to 4.500 pounds of tobacco, any lesser amount will not retain and generate sufficient heat for the sweating process. At this stage is reached, the tobacco has absorbed a sufficient amount of water so that fermentation begins and a sweating takes place and a natural heat created. Dur-

ing this stage, the temperature within the bulks is closely watched and observed each day and Hom six to eight days. thereafter depending upon the temperature rise (that is the temperature of the tobacco itself), the bulk is turned, that is to say, the bulk is broken up, the tobacco shaken out, the tobacco on the outside placed on the inside, that on the top is placed on the bottom, and vice versue, until by natural fermentation the tobacco is in a condition in which it may be handled or worked. At this stage, the tobacco is then separated, graded, kased (sprayed with water), and again placed in bulks where the sweating and fermentation and the turning of the bulk continues until such time as the tobacco is in condition to be baled and ready for market. In all of this handling, nothing is added to or taken from the tobacco except through the natural proc-. esses of evaporation and fermentation except sprinkling with water, or kasing. Any delay in the continuation of the treatment from the time the tobacco is picked from the stalk, or "primed" as above indicated until it is baled is dangerously likely to result in such damage or deterioration of the tobacco as to make it unsalable for any purpose. That the bulking and handling to be successfully, efficiently and economically carried out requires a tremendously large amount of valuable and expensive equipment, including a steam heated packing house equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, bulk covers, baling boxes and presses, wax paper, baling mats, packing, sorting and grading tables and, above all, the ability and knowledge of the handling gained only through experience. All of the above cannot be economically owned or.

bad except by farmers owning and growing at east a hun dred acres of tobacco a year, or more.

4. It is admitted that within 30 air line miles of Quincy,

in Gadsden County, Florida, there are approximately 300 farmers growing Type 62 tobacco, of which 80% grow less than 25 acres per year, and the majority of which grow from 1½ to 10 acres per year, and that approximately 3,500 to 4,000 pounds of tobacco are required to form an adequate bulk for the sweating of tobacco. Assuming a farmer to possess the necessary equipment, knowledge and the trained personnel to process his own tobacco, it would require the glacele-from at least 65 acres to form an adequate bulk of each priming. The processing or handling of the tobacco requires centrally skill and experience in order to successfully do it.

5. The town of Quincy, Florida, has grown up and around, and has a appropriately and exists almost solely by virtue of the agricultural products grown in its surrounding community. The principal, and almost sole source of income to the town of Quincy is from the raising of Type 62 tobacco. There are few industries or businesses of consequence in Gadsden County which do not have their roots in tobacco farming and other agricultural activities.

6. The population of the town of Quincy, according to the 1950

United States census is 6,586.

7. The growing of Type 62 tobacco and the handling or packing of this tobacco are complementary seasonal operations; that is to say, during the first half of the year the tobacco is being grown and during the latter half of the year it is being prepared .75 for market. The labor for both operations is drawn from the same labor source almost exclusively. That the workerswho are engaged in the preparation of the tobacco for market are essentially the same labor which grew it on the farms. That this same labor for the most part lives year round on the farms in tenant houses furnished rent free by the owners of the farm! La addition to the housing facilities, the labor is furnished free water and a farm plot on which they may raise their own vegetables and a limited amount of livestock. That transportation is furnished to them from their homes to their places of work, and return. Those living in Quincy are transported to the packing houses during packing. season." That to all intents and purposes the farm labor and packing house labor in the Quincy area are identical.

8. The Administrator under the Fair Labor Standards Act has, by his definition of area of production as applied to tobacks excluded any such packing plants and the employees thereof from the "area of production", if the plant is located within one into a town having a population of 2,500 and not more than 50,000. This definition, as applied to Quiney has created a situation whereby employs at one packing house are held to be covered by the Act, while other persons doing the identical work in another packing house a temblocks away are held not to be covered because of the exemption in Section 13(a) (6) of the Act if the packing house is swined by

the farmer who grew the tobacco which is being prepared for market. That if a farmer owns his own warehouse and processes.

his own tobacco the Administrator concedes he is not covered

other growers, then upon the beginning, and until the completion of the work for other growers he is contended by the Administrator to be covered by the Act.

9. That the application by the Administrator of the term, "area of production", as applied to Type 62 shade grown leaf tobacco and the town of Quincy, Florida, results in the tobacco of the small farmer being burdened with an extra twenty-five cents per hour for such labor and that it must move into an open, free and competitive market at a serious disadvantage to the tobacco produced by those who own their own plants and do their preparation of the tobacco for market therein. That the prevailing wages paid to laborers by farmers preparing their own tobacco for market in warehouses in Quincy is 50c per hour.

10. That during the year 1950, within one air line mile contiguous to Quincy, Gadsden County, Florida, (being an area within which the Administrator says is outside the area of production) there was actually planted, cultivated and grown more than 185 acres of U.S. Type 62 shade leaf tobacco, and that this acreage produced approximately 235,000 pounds of such, tobacco, which was likewise prepared for market within the town of Quincy, or one significantiquous thereto.

11. That the defendants are paying labor engaged in the preparation of tobacco in their plant or warehouse only 50c per hour, and that the minimum rate required by the Eair Labor Standards Act is seventy-five cents per hour.

77 12. That it is stated in the preface contained in Title 29, Chapter V. Code of Federal Regulations, Part 536, entitled, Definition of Area of Production, defining the term, "Area of Production", pursuant to Sections 7(c) and 13(a)(10) of the Fair Labor Standards Act of 1938, it is stated:

"Six hearings with respect to proposed definition of area of poduction were held during 1944 and 1945 covering the industries concerned with: (1) fresh fruits and vegetables, (2) cotton (3) tobacce; (4) grain, seeds, dry edible beans and dry edible peas; (5) dairy products, positry and eggs; and (6) miscellaneous agricultural and horticultural commodities not covered by other hearings. All parties appearing at the hearings were given an opportunity to be heard, to question witnesses and to file briefs and additional statements subsequent to the hearings. Distance and population criteria formed the basis for substantially all of the definitions proposed at the hearings.

13. That the Administrator gave none of the producers of U.S. Type 62 tobacco any notice of a hearing on the definition of the term, "area of production". That none of said producers appeared at the hearing above referred to, nor was any evidence taken in connection with the factual situation relative to the production of tobacco in Gadsden County, Florida. That at the time of making the & finition, the Administrator did not have any evidence of any : kind, character or description in connection with the economic situation, or in connection with the preparation of Type 62 tobacco for anarket in Gadsden County, Florida:

That the American Summera Tobacco Corporation' grows in and around Quincy. Florida, within a radius of 50: miles, approximately 1,250,000 pounds of tobacco per year and that a major portion of this tobacco is prepared in its raw or natural state for market in wavehouses belonging to the American Sumatra · Tobacco Corporation and that these warehouses are cated in the heart of the town of Quincy, and that by virtue of the provisions of Section 13(a)(6) of the Fair Labor Standards Act the employees of American Sumatra who prepare such tobacco for market in its raw or natural state are exempt from the provisions of the Act.

15. That King Edward Tobacco Company produces several hundred thousand pounds of Type 62 shade leaf tobacco in Gads- ; den County, all of which is prepared for market in its raw or natural state in its warehouses in Quiney, Gadsden County, Florida, and that such operation is exempt from the provisions of the Act.

16 That King Edward Tobacco Company also prepares in its raw br natural state for market U. S. Type 62 tobacco for farmers other than itself who are unable to maintain warehouses and that, the Administrator contends that when it handles the tobacco of other farmers that operation and the employees are covered by the Act.

17. That the warkhouses engaged in these operations are located within the city limits of Quincy, Florida, or one airline mile contiguous thereto; that approximately 2% of the growers of Type 62

shade leaf; tobacco in Gadsden County, Florida, including American Sumatra Corporation, produced as farmers approximately 40% of his type of tobacco grown in the area,

and that such growers and their employees are exempt under the

provisions of Section 13(a)(6) of the Act.

18. That the tobacco of the farmers above referred to enters a free and competitive market with a 25c per hour lower labor cost for the labor required for the preparation of their tobacco in its raw. or natural state for market than does the tobacco of independent . farmers whose employees are subject to the requirements of the Act under the definition promulgated by the Administrator.

19. That the application of the Act to the small growers who do not own warehouses saddles their tobacco with a labor cost in its final preparation in its raw or natural state for market of 25c per hour more than similar labor done on other tobacco owned by farmers who do not own their own warehouses.

20. That the following named farmers, who grow the number of acres of Type 62 tobacco listed opposite their names, to-wit:

Name—Address	No. of .1
C. C. Duke, Fowlstown, Ga.	6
T. W. Fletcher, Rt. 3, Quincy, Fla:	12
Gregory Brothers, Havana, Fla	13
Glenn Grifith, Calvary, Georgia.	7
A. M. Haire, Greensboro, Fla.	- 3
Car Haire, Greensboro, Fla.	4-
Drew Haire, Gretna, Fla	.8
P. J. Hammett, Cairo, Ga.	2
Leo Harrison, Whigham, Ga,	3 1
G. J. Hires, Greensboro, Fla	5.
A. F. Hopkins, Calvary, Ga.	1 1/2
M. J. Johnson, Rt, 3, Cairo, Ga	3
	1
80	
Jones & Watson, Whigham, Ga,	4
W. C. Jones, Whigham, Ga.	5 5 .8
Rubin Jordan, Rt. 3, Quincy, Fla	1 1/2
Glover Kemp, Havana, Fla.	1 2/10
Ellis Maxwell, Calvary, Ga	2'
.G. A. Maxwell, Rt. 3, Cairo, Ga	4:
Jack McFarlin, Quincy, Fla	7
H. L. McKeown, Quincy, Fla.	10
Lige McMillan, Chattahoochee, Florida	3
F. W. McNair, Whigham	: 1
Joe McNair (Colored), Hayana, Fla.	.2
Joe McNair (White), Calvary, Ga.	-1
Raymond Poppell, Concord, Fla	2
L. O. Rahberg, Cairo, Ga	1 1/4
O. W. Rowan, Greensboro, Fla.	1 .
J. G. Rudd, Quincy, Fla.	3.
Tyler Sanders, Route 3, Quincy	20
Jeff Shelfer, Quincy	30
Charles B. Smith, Havana	2 1 2
John B. Smith, Rfd., Quincy, Fla.	3 8 4
W. B. Smith, Havana	26
Spooner Farms, Greensbero	
Murray Spooner) Howard Suber, Greensboro	6
Marvin Suber, Rt. 3, Quincy	7 1.2
Worth Suber, Quincy	10
W. T. Suber, Jr., Cairo, Ga.	5
ii. 1. Euser, or., Dano, Classisis	

Name—Address		30	30 oi	10.15
Geo. C. Thomas, Jr., Cairo, Ga	. ,	11.0	3,-	
C. T. Lanlandingham, Greensboro				
C. D. Vickers, Whigham	,		2 '	
C. T. Williams, Calvary, Ga.			1	
A. M. Womack, Hayana	,	.0	11	
	*		0	
52 farmers			63 9 A	

did execute a contract with the defendants for the pactoration of their 1950 tobacco crop and will execute similar somfracts for their 1951 lobacco crop and that a copy of the contract which is attached to the answer of the defendants, marked Appendix 2, is a true and exact copy of the contracts executed by said farmers with the defendants.

21. That type 62 shade leaf tobacco is not salable or marketable until the process and treatment outlined bereinbefore is completed: From time to time as the tobacco of each farmer is dolivered to the warehouse fer processing, it is divided into various primings and kept separate in the bulks by partitioning the differentcrops, primings and owners with straps, with an accurate record upon an hourly or proportionate basis being kept, and that a record is also kept of the amount of time and expense accruing as at result of the work done and an account made available to the farmet. That the tobacco of each farmer can be identified at any time while it is in the warehouse of the defendants. After the preparation for matket has been completed, the tobaccoris reported for sale under the control of the farmer; that the tobacco may be sold by the farmer, or he may have it sold by the defendants for a commission, as the farmer chooses. That the farmer has the right to accept or reject any offers made for it, or make such sales to such buyers as he chooses, or to have the same sold by others in his behalf .

22. The existence of Joseph T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company,

82 .23. That there are approximately 108 workers employed during the preparation of the U. S. Type 62 tobacco in defendants warehouse.

CALDWELL, PARKER, FOSTER & WIGGINTON: /
By (S.) JULIUS F. PARKER.

Attorneys for Defendants

[·] Certificate of Service comitted in printing &

RESPONSE TO REQUEST FOR ADMISSIONS-Filed December 3, 1954

Now comes the Plaintiff reserving adl pertinent objections to admissibility which may be interposed at the trial, and in answer to the defendants request for admissions heretofore on the 1st day of November, 1951, served in the above stated matter says:

1. Plaintiff admits United States Department of Agriculture Circular No. 249, entitled American Tobacco Types, Uses and Markets states that type 62 shade leaf tobacco, a tobacco grown and used principally for eigar wrappers, is grown in North-Central Florida. Plaintiff further admits that Gadsden and Leon Counties, Florida, are contiguous.

Plaintiff neither admits nor denies that these counties are the only places in the world where this type tobacco it grown exclusively for the reason that he is without knowledge of the truth of skell facts, and for him to ascertain such facts would require a large

expenditure of public funds.

Flaintiff denies that type 62 tobacco grown in Gadsden and Leon Counties is grown within one air-line mile radius of the counties of Quincy, Florida, for the reason that no part of Leon County is within that specified distance.

Plaintiff admits that in general practice there usually are approximately 3,500 to 4,000 pounds of tobacco in a "bulk".

Plaintiff neither admits nor denies the other matters contained in Request No. 4 for the reason that he is without knowledge as to the facts and is mable to ascertain their truthfulness without the expenditure of a fremendous amount of time and money. In addition, lacking skill and experience in this field, Plaintiff can neither admit nor deny that considerable skill and experience is required to successfully carry on this production of eigar-wrapper tobacco by means of the bulking process, and furthermore the Request is based on numerous assumptions, such as "necessary equipment", "knowledge", "trained personnel" and "skill and experience", which are factors not capable of being reduced to a constant.

5 Plaintiff denies the matters contained in Request No. 5 for the reason that there appear to be numerous businesses and industries of a manufacturing nature in the town of Quincy employing anywhere, from 1 to over 100 copployees, thus creating a considerable competi-

tive labor market. .

Plaintiff states that Section 2 of the Act is as follows:

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of

the minimum standard of living need say for health, efficiency, aid general well-herng or workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetitate such labor conditions among the workers of the 'several States; (2) burdens commerce and the free flow of goods in commerces (3) constantes an untair method of competition in commerce, (4) leads to labor disputes burdening and

. obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in com-

"the It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several states and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning newer."

In addition, Plaintiff states that in the town of Quincy and surrounding areas there are a large number of laborers, no doubt more in number than the farmers, and that these laborers are certainly entitled to the minimum wage so that they may be in a position to compete with labor in other businesses, referred to above, and areas.

Furthermore, the Annual Report on Tobacco Statistics prepared and published by the Production and Marketing Administration of the United States Department of Agriculture in December, 1950, reveals, that the average price to the grower of type 62 shade-grown tobacco during the years 1934-1938, at the end of which the Act was Nessed by Congress, was 56 T cents per pound. During the period when this Act was in force this price to the grower soared to the. level of \$2.10 per pound in 1940. During these same periods,

whereas the production slightly more than doubled, the cropvalue increased four-told.

6. Plaintiff admits that the population of the town of Quiney, according to the 1950 United States census, is 6,586.

7. Plaintiff admits that the growing of type 62 tobacco and the handling or packing of this tobacco after it has been cured (dried by artificial heat) are complementary seasonal operations in the sense that they follow each other as a matter of time.

Plaintiff demes that it is essential that the same labor which grew the robacco on the farms, must follow this tobacco into the packing house and further process it therein.

In addition, illaintill neither admits nor denies the matters contained in sentences 4. 5 and 6 of this Request No. 7 since he is without knowledge as to the truth of the facts contained therein and is unable to obtain such knowledge without a tremendous expenditure of time and public funds.

8. Plaintiff admits that under the definition of 'area of production', validly issued and promulgated by the Administrator of the Wage and Hour Division, pursuant to Section 13(a) (10) of the Act, individuals are excluded therefrom if the establishment wherein the are employed is located within one air-line mile of any city with a population of 2,500 up to, but not including, 50,000

9. Plaintiff neither admits nor denies that the prevailing wage paid to laborers by farmers processing their own to-bacco in their own warehouses in Quincy is 50c per hour for the reason that he is without such information as would enable him to swear to the truth thereof and would be unable to obtain the necessary information without a large expenditure of both time and money in conducting investigations of all these farmers and their employees.

10. Plaintiff neither admits nor denies this Request No. 10 on the ground that he has no knowledge of such tacts and for him to secure such knowledge would require the expenditure of a great deal of time and public funds.

11. Plaintiff admits that as of the time of the Wage and Hour investigation the defendants were paying assorters employed by them in the production of processed tobacco in their plant or ware-house 50c an hour or less, and were paying other employees employed in their plant or warehouse more than 75c per hour. Plaintiff also admits that the minimum rate required by the Fair Labor Standards Act of 1938 as amended is 75c per hour.

12. Plaintiff admits the facts set forth in Request No. 12

13. Plaintiff denies that portion of Request No. 13, which portion is as follows: "That the Administrator gave none of the producers of U.S. Type 62 tobacco and notice of a hearing on the definition of the term 'area of production'." Notice was given to these parties

by publication of the notice in the Federal Register on Jan-88 uary 6 1945. 10 F R. 264. Plaintiff admits that the record of the administrative proceeding referred to herein tails to reveal that any of the producers of type 62 shade-grown to bacco appeared at said hearing, that any evidence was taken pertaining to the growing of said tobacco, or that the Administrator had any evidence specifically in connection with type 62 shade-grown tobacco.

14. Plaintiff neither admits nor denies the matters contained in Request No. 14 since he is without such knowledge and for him to secure such knowledge would require the expenditure of a large amount of time and public hinds. Whether the employees referred to berein are exempt or non-exempt is for a Court to decide and not Plaintiff. Plaintiff could not even offer an opinion without causing to be conducted a full-scale investigation to determine all the facts.

In addition, Plaintal states that the matters contained in Request Na 1 Core impacts and made want. The status of American Summers Telescen Corporation, a firmer, is manuterial to this cause The reason the employees of determines not are they employed by a farmer or on a lacin. If the enteloyees in American Sumitra Corporation are exempt it is by virtue of Section 13 (a) (b), which section was inserted by Congress riskill. Section 13 (a) (b) is a separation and distinct section applying to employees employed in agriculture. Congress thereby indicated its considerations of farmers and agriculture. However, Congress recognized that there might be instances where

Section 13 (a) (b) would, not apply and an exemption would be section 13 (a) (10), but recognizing the against task of formulating a set of standards defining "area of production" which would be applicable on a nation-wide basis it declined to define these terms and delegated to the Administrator, the duty of so doing. Section 13 (a) (10), with which we are here-concerned, is a complete section in itself and cannot be defined or interpreted by reference to other sections of the Act. Defendants' position cannot be discussed with reference to Section 13 (a) (b) since they are not farmers, but are manufacturers, nor do their activities constitute farming nor do they occur on a farm.

15. Plaintiff repeats and reasserts all his reply and statements in No. 14 above

.-16 Plaintiff repeats and reassers all his reply and statements in No. 14 above.

19 Plaintiff denies all the matters set forth in Request No. 19.

20 Plaintiff admits that the farmers whose names appear in Request No 20 and sign a document purporting to represent a contract between themselves and defendants for the further processing of the farmers. 1950 tobacco crop after it had been cured on the farm by the farmers. In no way did this document affect the employee-employee relationship between defendants and their employees. Plaintiff rannot tore see the inture and is therefore in a tile to admit or deny that these farmers will execute similar contracts in the fature.

Plaintiff admits that the copy of the contract attached to defendants answer is a true and exact copy of a form of contract furnished the Wage and Heur Investigator at the time of the investigation by detendants and represented to him by defendants as being the form of contract executed by and between the farmers and defendants.

22 Plaintiff admits the matters coldified in Request No. 22.

23 Plaintiff admits that at the time of the Wage and Hour inves-

tigation there were approximatel. 108 workers employed during the preparation of the U.S. type 62 tobacco in defendants' warehouse

(S.) WILLIAM S. TYSON,

Solicitor.

(8.) Reid Williams,
Acting Regional Attorney,
(8.) Robertson C. Hesse,
Attorney, United States Department of Labor,
Attorneys for Plaintiff

Certificate of Service (omitted in printing)

91 Duly sworn to by Robertson C. Hesse. Jural omitted in printing.

IN UNITED STATES DISTRICT COURT,

Objections to Portions of Defendants' Request, Etc.—Filed December 3, 1951'

Plaintiff in the above entitled cause makes the following objections to the written requests for admissions served herein by defendants on the 1st day of November, 1951.

1. Plaintiff objects to a portion of Request No. I, which portion is as follows: "(All of the tobacco grown in Madison County is packed in that county and will be disregarded in this request, although the similarity between conditions existing in Madison County, Florida, and those existing in Gadsden County, Florida, is so great that the decision in this cause will probably after each in the same fashion.)"

The objection is that these matters are irrelevant and immaterial to the cause and call for conclusions of law and fact and opinion rather than admissions of fact.

2 Plaintiff objects to this Request No. 2 on the ground that the matters set forth therein are immaterial and irrelevant to the issues in the cause. As an additional ground of objection thereto Plaintiff states that this Request calls for conclusions of fact law and opinions rather than admissions of fact.

3 Plaintiff objects to this Request No. 3 on the ground that the matters set forth therein one primaterial and irrelevant to the issues in the cause As an additional ground of objection

93 Plaintiff states that this Request code for conclusions of fact and law and opinions rather than admissions of fact.

7. Plaintiff objects to a portion of Request No. 7, which portion is as follows: "That this same labor for the most part lives years

rocker on the larms in tenant houses formsked tent tree by the owners of the larm. In addition to the housing facilities, the labor to turnished free water and a farm plet on which they may raise their own tree these and a fainted amount of fivestock. That transportation is farm-hed to their fiver their homes to their places of work, and roturn. These living in Quincy are transported to the packing houses during packing season. That to all intents and purposes the farm labor and packing house labor in the Quincy area are identical."

The objection is that this portion requests Plaintiff to swear to the veracity of a conclusion of fact rather, than make an admission of fact.

8. Plaintiff objects to such portion of Rec. St Vo. 8 as reads: This definition as applied to Quinev has created a situation whereby implovees at one packing house are held to be covired by the Act, while other persons doing the identical cook is ansother packing house a few blocks away are held not to be covered because of the exemption in Section If (a) (6) of the Act if the packing house is owned by the farmer who grew by tobacco which is being prepared for market. That if a farmer owns his own warehouse and processes his own tobacco the Administrator concedes he is not covered by the Act, but if he undertakes to prepare the fibbacco of other growers, then upon the beginning, and until the completion of the work for other growers he is contended by the Administrator to be covered by the Act.

The objection is on the ground that the above choted portion requires Plaintiff to formulate and swear to conclusions of law based on the hypothetical and incomplete facts contained therein. Furthermore, even were Plaintiff in a position to state his opinion on the conclusions called for the spin he would have to cause to be conducted extensive intestization of all the growers and their employees released to be earliers or growers, and their answer have not claimed to be farmers or growers, and their are no farmers or growers involved in this action.

Plaintiff elects to a portion of Request No. 9 which portion peace is tollow. That the application by the Minimistrator of the terms area of production, as applied to Type 62 shade grewn leaf toler of and the town of Quiney, Florida, results in the tolerco of the small larger being burdened with an extra twenty-five cents per hour for such labor and that it must move into an open, free and comparing market at a serious disadvantage to the tolerco traduct by these who own their own plants and do their preparation at the tokacco for market therein."

The objection is that the above quoted portion does not contain that which Claimfiff can either admit or deny but in essence is a series of conclusions both of fact and law calling for an expression

of opinion rather than an admission of any fact by Plaintiff 17. Plaintiff objects to the entire Request No. 17 on the ground that it is so ambiguous and unintelligible as to be

incapable of being answered.

18: Plaintiff objects to Request No. 18 on the ground that it is not sufficiently clear for him to determine what he is requested to admit or deny and that it is ambiguous and unmedligible. In addition, it we're' involve an expenditure of tang and choney for Plaintiffsto determine what constitutes "labor cost" and other items in this Request.

. 19. Plaintiff objects to the online Request No. 19 on the grounds that it is so ambiguous and unmitelligible as to be incapable of

being answered.

21. Plaintiff objects to Request No. 21 on the ground that the matters contained therein are immaterial and irrelevant to the issues in this cause.

Wherefore, Plaintiff moves this Court for an order striking out-Requests numbered 2, 3, 17, 18, 19 and 21 and such portions as are above specified of Requests numbered 1, 7, 8 and 9 and excusing thim from replying to them.

Dated: November 30, 1951.

(S.) WILLIAM S. TYSOX

Soliettor,

IS + REID WILLIAMS.

Acting Regional Attorney.

(S.) ROBERTSON C. HESSE.

Attorney, United States Department of Labor, Attorneys for Plaintiff. IN UNION STATES DISTRICT COURT

North

Please take house that the undersigned will bring the above objections on for hearing before this Court at such place and at the curries practicable time as the Court way determine

Comments of service country in printings

IN UNITED STATES PISTRICE COURT

AMENDMENT TO PLAINTIES - RESPONSE TO DEFENDANT - REQUEST TOR ADMISSIONS Filed December 15, 1951

Pursuant to Rule 15 Plaintiff hereby amends paragraph 14 of his Response to Defendants' Request for Admissions heretofore filed in the cause to read as follows:

14 Plainting neither admits nor denies the matters contained in Lequest No. 14 since he is without such knowledge, and For him to secure such knowledge would require the expenditure of a large knowledge with public funds.

In addition, plaintiff can neither admit for deny Request No. 14 for other reason that said Request obviously calls for a conclusion of law which is solely within the jurisdiction and authority of a Court of law.

(S) WILLIAM S. TYSON.

rotherlos.

(S) BEVERLY R. WORRELL.

Regional Attorney

(S) ROBLICTSON (HESSE.

Attorney United States Department of Lubor.
Attorneys for Phinten.

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IN UNITED STATES DISTRICT COURT

ORDER ON PLEADINGS Filed February 5, 1952

This matter came on for hearing this day on certain motions filed herein and the following proceedings were had:

1. Motions to strike certain parts of answer were abandoned because of filing of amended answer.

2. During the course of argument counsel for defendants moved the Court for permission to amend instanter requests for admissions numbers 9 and 19, which were granted.

3. The Court heard argument upon objections to certain of the requests for admissions and made radings thereon, and in consideration thereof, it is

Ordered and Adjudged:

A. That the objection with reference to Madison County, Florida, in request for admission #1 be and the same is hereby sustained.

B. That the words "and becomes valueless for any purpose" in request for admission #2 be stricken and otherwise the objection to said request for admission is overruled.

... C. That objections to requests, for admissions #s 3, 8, 9, ks

amended and 19, as amended, are overruled.

D. That objection to requests for admissions #s 7, 17, 18 and 21 are sustained.

Done and Ordered at Tallahassee, Florida, this 5th day of February, 1952.

(S.) Dozier A. DeVane, United States District Judge.

12 IN UNITED STATES DISTRICT COURT

RESPONSE TO REQUEST FOR ADMISSIONS Filed February 18, 1952

Now comes the plaintiff, reserving all pertinent objections to admissibility which may be interposed at the trial, and pursuant to this Court's Orde. On Pleadings and in answer to Defendants Request For Admissions heretofore served in the above-stated matter, says:

- (2) Plaintiff admits the facts set forth in Request No 2
- (3) Plaintill admits the facts set forth in Request No. 3 with the exception that plaintiff denies that a farmer must own and grow one hundred or more acres of tobacco before he can economi-

cally own or have all the equipment set forth indiclescribed in this Request No. 3.

ser forth in his Objection to this Request and stating that 101—the matters called for in this Request are conclusions of law and fact which must be determined by a Court through litigation properly encompassing such issues, states that it is only within his authority to render an opinion as concerns the conclusions called for in this Request and that it is his opinion that these conclusions should be denied with the exception that, in his opinion, if such farmer undertakes to prepare the tobacco of other growers in his packing house then upon the beginning and until the completion of the work for the other growers he is covered by the Act.

(9) His objection to a certain portion of Request No. 9 having been overruled by the Court, plaintiff denies all of the facts and conclusions contained in that certain portion.

(19) Plaintiff denies the facts and conclusions contained in Re-

quest No. 19.

(S.) WILLIAM S. TYSON.

Solicitor.

(S.) Beverley R. Worrell.

Regional Attorney,
(S. Robertson C. Hesse.

Attorney, U. S. Department of Labor. Attorneys for Plaintiff

102 Certificate of Service (omitted in printing)

Duly sworn to by Robertson C. Hessee. Jurat omitted in printing.

103 IN UNITED STATES DISTRICT COURT

DEFENDANTS, NOTICE OF TRIAL-Filed March 20, 1952

To: Beverley R. Worrell, Regional Attorney,
Office of the Solicitor,

U. S. Department of Labor, 1908 Comer Building, Birmingham 3, Alabama

You are hereby notified that the Honorable Dozier A. DeVanc, United States District Judge for the Northern District of Florida, has set the above entitled cause for trial to begin at 10:00 A. M., Eastern Standard Time, on the morning of April 21, 1952, the trial

to be held at the Courtroom of the Federal Court House, Post Office Building, Tallahassee, Florida,

Dated this 18th day of March, A. D. 1952.

CALDWELL, PARKER, FOS-TER & WIGGINTON.

By (S.) JULIUS F. PARKER, Attorneys for De-

904. Certificate of Service (omitted in printing)

IN UNITED STATES DISTRICT COURT

INTERROGATORIES-Filed March 20, 1952

To the Defendants: "

You are hereby requested to answer the following interrogatories in accordance with Rule 33 of the Federal Rules of Civil Procedure.

- 1. As to each of the farmers listed in Request No. 20 of defendants' amended Request for Admissions how many pounds of the 1950 crop of Type 62 shade-grown tobacco, by each grade and "priming", grown by or on the farms of each of these farmers was processed or bulked in defendants' packing house in Quincy, Florida?
- 2. How many pounds, by each grade and priming, of the tobacco referred to in Interrogatory No. 1 was sold, assigned, or transferred to Budd Cigar Company, a corporation, Quincy, Florida?
- 3. What were the total dollar values of each grade and priming of this tobacco so seld, assigned a transferred to Budd Cigar Company?
- 4. How many pounds of tobacco, by each grade and printing, to be used for eight wrappers was bought by Budd Cigar Conomy, a corporation. (a) in the last six months of 1950, (b) in the first six months of 1951?
- . 5. What were the total prices, for each grade and priming of the tobacco referred to in Interrogatory No. 4 paid by the Budd Cigar Company, a corporation, in each of the periods designated in said Interrogatory No. 4?
- 6. Was any of the tobacco referred to in Interrogatory, No. 1 above sold, delivered, or transferred to any person company, partnership or corporation?
 - 7. If the answer to Interrogatory No. feabove is in the affirmative -

what was the name and address of each such person, company partnership or corporation?

8. As to each of the persons, configures, partnership in corporations named in Interrogatory No. 7 above what were too goals numbers of pounds of the tolkacco referred to in Interrogatory No. 1.

by each grade and printing, sold, delivered or transferred to.

106 such persons, companies, partherships arricogramations?

9. What were the total amounts paid by each of such persons, companies partnerships or companies as to each grade and priming for the tobacco referred to in interrogatory No. 8 above?

10. To which of the farmers listed in Request No. 20 referred to in Interrogatory No. 1 above as briving contracts for bridging with defendants did defendants advanted ofth, fertilizer, seed, finds or anything else?

11. As to each of the farmers referred to inclnterrogatory Xd. 10. receiving advances of funds, cloth, etc., from descendants what was the cost of or value of the materials so advanced and the fundament of the funds so advanced?

2 12. Was any interest charged by derendants on the money and vanced by them to the farmers reterred to in No. 10 above?

what was the rate of the interest so charged?

14. What was the cost to defendants of the cloth, fertilizer and or obser materials advanced or furnished by defendants to these farmers Blying contracts with the defendants?

f5. What was the original cost or purchase price of the defendants, packing house and equipment to the defendants wherein the tobacco grown by these farmers having contracts with the detendants was packed or bulked?

, 16. What is the present book value of this packing house and these facilities referred to in Interrogatory No. 15?

107 17. How is the amount of rent the individual farmers, referred to in Interrogatory No. 1 above, pay delendants under their contracts computed?

18. What was the total amount received by defendants from these rents during the 1950 season?

. 19. What was the total amount received by defendants as commissions on the sales of tabacco grown in 1950 by these tarmers who had contracts with defendants?

20. Did any of the farmers, referred to in Interrogatory No. 1 abov, who had contracts with defendants take their tobacco elsewhere for sale by other persons after it had been packed or bulked in defendants packing house?

21. If the answer to Interrogatory No. 20 is in the affirmative,

6

which of the farmers referred to therein sold their tobacce through other persons of sales agents.

(S.) WILLIAM S. TYSON

Solicitor,

(S.) Beverley R. Workell. Regional Attorney.

(8) Robertson C. Hesse.
Attorney, U.S. Department of
Labor, Attorneys for Plaintiff.

108 CERTIFICATES, OF SERVICE (Omitted in printing)

IN UNITED STATES DISTRICT COURT

(Title Omitted)

Answers to Interrogatomes riled April 1, 1952 .

Come now the defendants, J. T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company and file this their answers to the interrogatories propounded to them by the plaintiff.

1. 333.889 pounds of the tobacco of the farmers listed in Request No. 20 was processed or bulked in detendants apacking house in Quincy. Flerida. Attached hereto are copies of the settlement sheets showing the amount of tobacco processed for each farmer with the grade thereof and the prices paid therefore. The original records of seach "priming" for the year 1950 are not available as they have either been destroyed or are so mixed up with other records in the packing house that they cannot be reassembled.

2. All of the tobacco processed for the farmers listed in Request No. 20 was purchased by Joseph T. Budd, Jr. and Florence W. Budd, however, only 231,500 pounds was sold, assigned or transferred to Budd Cigar Company, a corporation of Quiney, Florida. The remainder of the tobacco was sold to those persons, firms, or corporations listed in the invoices which are attached hereto marked defendants' Exhibit Series B.

3. The total dollar value of each grade and priming of the tobacco sold or assigned to Budd Cigar Company was as follows:

82:715 lbs.	No. 1 String @	\$3.00	\$248,145.00
122,264 lbs.	No. 2 String Off Color @	2.25	275.014.00
21,922 lbs.	No. 2 String Off Color @	2.29	50, 201, 38
. 4,357 lbs	No / String @	3.00	13.07 .00
151 lbs.	No. 2 String Off Color @	2.297	. 315.79

231, 209 Lbs. Total Total Dollar Value

8586,857,17

- 110 4. The number of pounds of tobacco, by each grade and printing, to be used for eiger verappers bought by Badd Cigar Company, a corporation, (a) in the last six months of 1950 was Nobe. (b) in the first six months of 1951 the number of pounds purchased were 231,209.
- 5. Question No. 5 is answered by the Exhibit A Series attached hereto.
- 6 All of the tobatco referred to in Jaterrogatory No. 1 was sold hist to J. E. Budd Tobacco Company, who in turn sold 231, 209 pounds of it, as answered in Interrogatory No. 3, to Budd Cigar Company. The remainder was sold to the persons, firms or corporations listed in the invoices attached hereto as Series Exhibit B.
 - 7. Exhibit B series attached herete answers Question No. 7.
- 8. Question No. 8 is answered along with the answer for Interregatory No. 3.
 - 9 Offestion No. 9 is answered the same as Question No. 8
- 10. The defendants advanced gloth, seed and funds to all of the farmers listed in Request N_{Ψ} 20; it advanced fertilizer to none of them.
- 11. Question No. 11 is answered by the Exhibit A Series which reveals the monies advanced to the farmers and the total value of the goods advanced which was computed at cost plus five percent.
- 111 12 No interest was charged by the defendants on monies advanced by them to the farmers referred to in Interrogatory No. 10.
- 13. The answer to question No. 13 is that no rate of interest was charged
- 14. The cost to the defendants of the cloth and other materials advance for furnished by the defendants to the farmers referred to was the sum listed on the settlement sheets with the farmers except that the sums listed represent cost plus five per-cent.
- 15. The original cost of the defendants' packing house was \$70,-451 15. This includes equipment.
- 16 The original cost of \$70.451.15 for the defendants, packing house and equipment has been depreciating \$21.959.60, plus \$2.-779.44, leaving a present book value of \$24,739.04.
- 17. and 18. The amount of rent of the individual farmers is revealed in the Exhibit Series A. The total amount received from said farmers is \$4,453.50. This rent was charged for use by We farmers of the space for a six month's period. During the remainder of the year the warehouse is rented to Budd Cigar Company for a total rent of \$4.800.00.

19. The defendants charged no commissions on the sales of tobacco grown in 1950.

20. None. 112 21. None.

> Joseph T. Budd. Ir., Florence W. Budd. By Julius F. Parker. Attorney for the Defenda

Didy sworn to by Julius F. Parker, jurat omitted, in printing.

113

EXHIBIT A-No. 1.

J. T. Budd, Jr. & Co. Quincy, Fla.

January 2, 1951

Mr. Marvin Suber, R-3, Quincy, Fla.

Statement of 1950 Packing Shade Tobacco

4946 lbs. No. 1 Wrapper @	\$2.29	\$11,326.34
329 lbs. Off Color (long) (a.	2.00	658.00
63 lbs. Off Color (short) (a	1.50	94.50
855-fbs. Brokes (a	1.25	1,068.75
199 lbs. Filler @	40	77.60
321 lbs. 5th Priming (a	1.75 4	561.75
472 lbs. 6th Priming @	1.75	826.00
1157 lbs. Tops @	1.00	1,157.00
1101 toe. 1 ops @		1,107.00
		\$15,769.91
Cash Advanced Advances		
Cash Advanced		§12,046.33 .
Labor		1,184:80
Rent		112.50
Baling Material		74.31
Insurance		98.67
		\$13.516.64
Check Herewith		\$ 2,253.30
		- 9 3
		\$15,769.94

1.14

Received Payment:

(S.) - MARVIN SUBER

Copy

EXHIBIT A No. 2.

Al. T. BUDD, JR. & CO. Quincy, Fla.

January 6, 1951

Fr. Drew Haire• Quincy Fiorida

Statement of 1950 Packing Shade Tobacco.

6780 lbs: No. 1 Wrappers @ 2.43	816, 475, 40
150 lbs. Off Color (Short) @ 1.00	150.00
1650 lbs. Brokes @ \$1,25	2.062.50
276 lbs. Filler @ 8:40	110.40
104 lbs. Tops (a \$1.00	
	\$18,902.30
Advances	
Cash Advances	8 1.574 35
Labor	961.55
Rent	135.00
Baling Material	67.26
Insurance	95.88
	\$ 2.834.04
(35)	A Samuel Annual Commission

115			- T
Balance Less Insurance Tobacco		•	\$16,068,26 4,788,00
Plus Salvage			811,280,26 2,342,00
Check Herewith			\$13,622 26
Received Payment: (8.)	DREW HAIRE Copy		
· 60	XHIBIT A-No.	3.	
	T. Budd, Jr. & C Quincy, Fla	0.	

Mr. Clint Bassett Quincy Florida

Statement of 1950 Packing Shade Tobacco

January 16, 1951 ·

7282 * No. 1 Wrappers @ 82.15	\$15,656 30
2328 %, Off Color (Long) @ \$2.20	1,656.00
229 * Off Color (Short) @ \$1.00	229 00
3280 * Brokes @ \$1.25 533 * Filler @ \$.40	220
61 & Dark Tobacco @ \$.50	. 30.50
752 × 7th Priming @ \$1.50	
1096 × Tops @ \$1.00	1.096.00
p. 4)	
경소 시 이 이 경기 등에 보는 그 경기를 보고 있는 것이 없는 것이다.	\$27,109.00

116 5	Advances			1.	
Cash Advanced				13.078.	
Cheeseeloth		-1		3,789	
Labor Rent	•		.00	2,663. 180.	
Baling Material		0 .0		1117.	
Insurance		1.		728	46
			8	20,101.	
Check Herewith				7.007.	46

(8.) CLINTON BASSETT.

Copy

EXHIBIT A-No. 4.

Suber & Johnson Phone 270

A No. 1898

Quincy, Fla. 2-6 195 Load of Cheese Cloth From J. T. Budd; Jr. & Co. To J. T. Budd, Jr. & Co. Driver, on-off

117

Fees. L.B.C. Weighter Gross Wt. 7965 lbs. Tare 5500 lbs. Net Wt. 2465 lbs. Net Bush

CEINT BASSETT

Copy

EXHIBIT A-No. 5.

Suber & Johnson Phone 270

A No. 1899

Quincy, Fla. 2 6 195 Load of Cheese Cloth From J. T. Budd, Jr. & Co. To J. T. Budd, Jr. & Co. Driver, on-off

		NO.
ш	и	v
ш	и	
-	ш	

Gross Wt. 7,040 lbs. Tare 5500 lbs. Net Wt. 1540 lbs. Net Bush

Weigher

CLINT BASSETT

Copy

EXHIBIT A—No. 6. J. T. Budd, Jr. & Co. Quincy, Fla.

January 11, 1951

Mr. Ellis Maxwell Reno ..

Georgia

Statement of 1950 Packing Shade Tobacco 3190 lbs. No. 1 Wrappers @ \$2.35 \$ 7,496.50

492 lbs, 8th Pr. @ \$1.60 787.20377 lbs. Tops @ \$1.045 393.97

\$ 8.677.67 119

Advances

Cash Advanced
Labor
Rent \$ 7,562.40 257.3845.00

Baling Material -40.59Insurance

\$ 7,946.85 730.82Check Herewith... Received Payment:

(S.) ELLIS MAXWELL

Copy

EXHIBIT A-No. 7.

J. T. Budd, Jr. & Co. Quincy, Fla.

January 10, 1951 •

Mr. M. J. Johnson Reno. Ga.

Statement of 1950 Packing Shade Tobacco 2651 lbs. @ \$2.37, No. 1 Wrappers

\$ 8,652.87 370 lbs. @ \$1.81, Second Priming 669.70376 lbs. @ \$1.00, Tops.... 376.00

\$ 9,698.57

218.00 61.50 83.75

120	
Cash Advanced Cheese Cloth Labor Rent Baling Material Insurance	563.33
Check Herewith Received Payment:	\$\8.022.60 \$ 1.675.97
6 (S.)* M. J. JOHNSON Copy EXHIBIT A—No. 8. J. T. Budd Jr. & Co. Quincy, Fla.	
January 11, 1951 Henry Davis RFD Chattahooche, Florida Statement of 1950 Packing Shade Tobacco	
2060 lbs. o. 1 Wrappers @ \$2,375 109 lbs. Off Color (Long) @ \$2.00 41 lbs. Off Color (Short) @ \$1.50 67 lbs. Brokes @ \$1.25	\$ 4.892°.50 218.00 61.50 83.75

121			. / ***
9 lbs. Filler @ \$.40 365 lbs. Tops @ \$1.0			3.60 365.00°
.4	Advances		\$ 5 624.35
Cash Advanced Labor Rent			\$ 3,539.20 27 17 30 00
Baling Material			28.3
		4	8 3,955.45
Check Herewith Received Paymen	t: V		\$ 1,668.90
	(S.) H. J. DAVIS Copy		
	ЕХНІВІТ А—Х	0. 9.	
	J. T. Buid, Jr. & Quancy, Ela.		
	ACC.		

January 11, 1951 🖏 🔅

Spooner Farm Greensboro Florida

122	
Statement of 1950 Packing Shade Tobacco 22952 lbs. No. 1 Wrappers @ \$2,35 2616 lbs. Tops @ \$1,43	\$51,642.00 2,956.08
Advances	856,893,28
Cash Advanced Labor Rent: Baling Material	\$55,033.69. 1,819.00 300.00 258.42
Insurance Balance due usig	255 68 \$57,666 79 \$ 773 51
Statement Accepted as Correct: (S.) MURRAY SPOONER	
Copy EXHIBIT A-No. 10.	
J. T. Budd, Jr. & Co. Quincy, Fla.	
Mr. H. S. Bets Quincy Florida	
Statement of 1950 Packing Shade Tobacco 1051 lbs. Wrappers @ \$2.21 38 lbs: Off Color (Short) @ \$1.00	\$ 2.322.71 38.00

		3.
123		
26,lbs, Brokes @ \$1.2		20.00
, 10 lbs. Fillers @ 8.40		32.50 4.00
345 lbs. 5th Pr. @ \$1.	75	603.75
406 lbs. 6th Pr. @ \$1.	50	500
277 lbs. Tops @ \$1.00		277.00
	•	1
		\$ 3,886.96
Track Administra	Advances	2 0 101 00
abor		\$ 3,421.02 149.75
Rent	*****	30.00
Baling Material		26, 55
		22.69
Chair II		8,3,653.01
Check Herewith Received Payment:		s 233.95
(\$	S.) H. S. BETTS	
	Сору	
	EXHIBIT A-No. 11.	
	J. T. Budd, Jr. & Co. Quincy, Fla.	
	2 January 1951	
Mr. W. T. Suber, Jr.		
Gretna		
Florida	484	
Statemen	t of 1950 Packing Shade Tol	oaceo
3505 lbs. No. 1 Wrapp	pers @ \$2.30	8-8.061.50
838 lbs. Off Color Wra	ppers @ \$2.00.	1,676.00
Catherine of the comment of a market of the	manufacture of the second of t	

124	1177
80 los. Off Color (Short) (a. \$1.50	120.00
816 lbs. Brokes @ \$1.295	1:056.72
111 lbs. Looseleaves @ \$40	44.40
564 lbs. Tops @ \$1.00	564.60
	\$11,522.62
Advances	
Cash Advanced	\$ 9,650.20
Labor	900.94
Rent	75.00
Balling Material Insurance	$49.56 \\ 63.37$
Insurance.	00.01
	\$10,739.07
Check Herewith Received Payment:	\$ 783.55
(S.) W. T. SUBER, JR.	
(8.) H. I. SCHER, JR.	
Copy	
EXHIBIT A-No. 12.	
J. T. Budd, Jr. & Co.	
Quincy, Fla.	
Lanuary 11, 4051	Pi.
Mr. L. O. Rehberg	2
Reno	
Goorgia	
Statement 1950 Packing Shade Tobacco	
1511 bs. No. 1 Wrappers @ \$2.36	\$ 3,565.96 219.44
208 lbs. Tops @ \$1.055.	210.44
	\$ 3,785.40

125.			
	Allances		
Cash Advanced > Labor			307 66
Labor	Territoria (* 1848)	1	124 - 34
Kente			18.40
Baling Material.			17.70
Insurance			17.19
0		8.3	.485.61
* Check Herewith			299.76
Received Payment:			
(S.)	L.O. REHBERG		
.0.	Copy		
. 1	EXHIBIT A-No. 13.		
	J. T. Budd, Jr. & Co. Quincy, Fla.		
	January 3, 1951		
Mr. Otha Rowan			
Route 3			
Quincy, Florid	a		
Statement	cf 1950 Packing Shade	Tobacco	
874 lbs. No. 1 Wrappers	6 82 11	8 2	106 21
. 43 lbs. Off Color (Long)			86.00
10 lbs. Off Color (Short			15.00
29 lbs. Brokes @ \$1.25			36.25
6 lbs Fillet 6 \$ 10			2 40

JAMES P. MITCHELL 15 JUSEPH 1 BUDD, JR	
126:	
275 lbs. 6th Priming @ \$1.50 55 lbs. Tops @ \$1.00	412.50 ° 55.00
	8, 2, 713, 49
Cash Advanced	8 2.686 00
Eabor	97 17
Rent	15.00
Baling Material	14.16
Insurance	11.21
	\$ 2,926.57
Balance due us	\$ 213:08
Statement Accepted as Correct:	-323
(S. OTHA ROWAN & S	
EXHIBIT A—No. 14.	
J. T. Budd, Jr. & Co.	
Dealer in Cigar Led Tobacco. Quincy, Karida	
January 3, 1951	
Mr. G. A. Maxwell Calvary	. 0
Georgia	
Statement of 1950 Packing Shade Tobacco	
2483 lbs. No. 1 Wrappers @ 82.125 17 lbs. Off Color (Short) @ \$1.00	\$ 5.276.38 17.60
	4
127	
29 lbs. Brokes @ \$1.25	36.25
518 lbs. Tops & 6th Priming @ \$1.00	518.00
연극 중인 원통이 가는 생님들은 심하였다.	\$ 5.847.63
Advances	
Cash Advanced	\$ 3,810.61
Labor Rent.	37.50
Baling Material	35.40
Insurance &	32 61
	e 1 191 ns
	\$ 4.121 95
Check Herewith	\$ 1,725.68
Received Payment:	
The second secon	
(Ş.) G. A. MAXWELL By GLEN GRIFFITH	

Copy

EXHIBIT A-No. 15.

J. T. Budd, Jr., & Co. Dealer In Cigar Leaf Tobacco Quincy, Florida

January 2, 1951

Mr Fred W. McNair Route 2

Whigham, Georgia

Statement of 1950 Shade Packing Tobacco

1236 lbs. No. 1 Wrapper @ \$2.35	\$ 2,904.60
	\$ 2,981.60
Advances	
Cash Advanced	\$ 2,458.13
Labor	87.02
Rent	
Baling Material	12.39
Insurance/	13.09
	• \$·2,585.63
Cheek Herewith	. \$ 395.97

Received payment:

(S.) FRED W. McNAIR By T. C. McNAIR

Copy

EXHIBIT A-No. 16.

J. T. Bûdd, Jr. & Co. Dealer In Cigar Leaf Tobacco. Quincy, Florida

January 3, 1951

Jones & Watson

Route 2 Whigham, Georgia'

Statement of 1950 Packing Shade Tabacco

440 lbs. Tops @	()						466.4	
A STATE OF THE STA	1					810	657 .:	3.5
and the second		* *	Advan	ices-				
Cash Advanced					N	8 7.	699 .:	29
Labor					•		309 (33
Rent							52.	50
Baling Material						0	49 %	56
Insurance		75. B.					.47.7	7
				•		00	100	
						00.	,158.7	0
Check Herewith						\$ 9	498.0	'n

Received Payment:

(S.) JONES & WATSON By R. E. WATSON

Copy

EXHIBIT A-No. 17.

J. T. Budd, Jr. & Co. Quincy; Fla.

January 3, 1951

Mr. C. T. Vanlandingham Greensboro Florida

Statement of 1950 Packing Shade Tobacco.

519 lbs. Tops @ \$1.06	US2.25	\$ 9,985.15 550.14
	Advances	\$10,535.29
Cash-Advanced Labor		297.74 60.00
Che k Herewith.		\$ 8,216.08 \$ 2,319.21

Received Payment:

(8.) C. T. VANLANDINGHAM

Copy

EXHIBIT A-No. 18.

J. T. Budd, Jr. & Co. Quincy, Florida

January 3, 1951

Mr. W. C. Jones Route 2 Whigham, Georgia

Statement of 1950 Packing Shade Tobacco

783.08 265.73 560.26 75.00 83.19 79.19
063.37. 719.71

W. C. JONES

Copy

EXHIBIT A-No. 49.

J. T. Budd, Jr. & Co. Quincy, Florida

January 2, 1951

Mr. Gordon Hiers Greensboro Florida

Statement of 1950 Packing Shade Tobacco

	-0 7
4074 lbs. No. 1 Wrappers @ \$2.43	8 9,899.82
364 lbs. Off Color (Long) @ \$2.00	728.00
111 lbs. Off Color (Short) @ \$1.00	111.00
200 lbs. Brokes (a. \$1.25	250.00
54 fbs. Looseleaves (a 5.40	11 00
12 lbs. Dark Tobacco @ \$1.00	12.00
175 lbs. 6th Priming @ \$1.50-	262.50
212 H. Torre 6 21 00	202.00
343 lbs. Tops @ \$1.00.	343.00
	\$11,620.32
Advances	
Cash Advanced	8 8 995 61
Labor Rent Baling Material	512 15
Rent	72 00
Rolling Material	10.00
Transfer of the second	
Insurance	
	-
	\$ 9,725.15
Check Herewith	\$ 1,895.17

Received Payment:

(8.) GORDON HIERS

EXHIBIT A-No. 20,

J. T. Budd, Jr. & Co. Quincy, Fla.

January 2, 1951

Mr. Glen Griffith Calvary Georgia

Statement of 1950 Packing Shade Tobacco

8436 lbs. No. 1 Wrapper @ 82.35 819.82 7069 lbs. Tops @ \$1.065 1,13		
	8.48	
820.96		
- W	3.08	
Advances*		
Cash Advanced \$10,09		
Labor 62	8.57	
	0.00	
Baling-Material 9	9.12	
	5.05	
211 00	7 11	
\$11.00	1.11	
Check Herewith \$ 9,95	5.91.	

Received Payment:

(S.) GLEN GRIFFITH

-	80	-
	800	ю с

EXHIBIT A-No. 21:

J. T. Budd, Jr. & Co. Quincy, Fla.

January 2, 1951.

Mr. Oscar Dean Route 3 Quincy, Florida

Statement of 1950 Packing Shade Tobacco

2343 lbs. No. 1 Wrappers @ \$2.345. 330 lbs. Tops @ \$1.095	\$ 5,494.33 361.35
Advances	\$ 5,855:68
Cash Advanced	\$ 3,954.18
Labor	169.26
Rent	30.00
Baling Material	30.09
Insurance	26,73
	4,210.26
Check Herewith	\$ 1,645.42

Received Payment:

(S:) OSCAR DEAN

EXHIBIT A-No. 22.

J. Budd, Jr. & Co. S Quincy, Fla:

January 2nd 1951

Rubin Jordan Route 3

Quincy, Florida

Statement of \$050 Packing Shade Tobacco.

313 lbs. No. 1 Wrappers (a \$2-25	\$,704.25
20 lbs. Off Color (long) 2.20	41.00
25 lbs. Off Color (short) 1 (0)	25.00
35,lbs. Brokes 1.25	13.75
242 lbs. 2nd Priming 2.25	511.50
326.lbs. 3rd Priming 2 00	652.00
The Board Donath	834.00
60 ibs. Tops 1:50	60.00
•	\$ 2.907.50
Advances	5 2,507.50
Cash advanced	\$ 2.150.00
Labor	1111.27
Rent	22.50
Baling Material	17.70
Insurance	17.13
	\$ 2.318.60
Check Herewith	\$ 588.90
Daniel Daniel	

Received Payment:

(S.) RUBIN JORDAN

EXHIBIT A-No. 23

J. T. Budd Jr. & Co. Quincy, Fla.

2 January 1951.

Mr. Howard Suber Route 3 Quincy, Florida

Statement of 1950 Packing Shade Tobacco.

-6862 lbs. No. 1 Wrapper @ \$2.36	\$16,194.32
620 lbs. 8th Priming @ \$1.60	8 992.00
	\$ 810.00
	\$17,996.32
Advances	
Cash Advanced	814,727 46
Labor	
Rent	90.00
· Baling Material	86.73
Insurance	82.92
	80
	\$15,544.18
	8 2,452 14
Check Rerewith	8 2,452 14
Payment Received:	

EXHIBIT A-No. 24.

J. T. Budd, Jr. & Co. Quincy, Fla.

2 January 1951

Mr. Steve Dolan Route 1

Chattahoochee, Florida

Statement of 1950 Packing Shade Tobacco

3513 lbs. No. 1 Wrapper @ \$2.35 460 lbs Tops @ \$1.055	\$ 8,255,55 \$ 485,30
Advances	\$ 8,740.85
Cash Advanced Clabor	\$ 7,252.15 250,48
Rent Baling Material	45.00 42.48
Insurance	39.73
	\$ 7,629.84
Check Herewith	8 1.111.01

Received Payment:

STEVE DOLAN-

0

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	碸	α.	п	٩.	N

EXHIBIT A-No. 25.

J. T. Budd, Jr. & Co. Cigar Leaf Tobacco Quincy, Fla.

January 5, 1951

Mr.	Jack N	IcFarl	in
	Quincy	9.	*

Statement of 1950 Packing Shade Tobacco

	2600 lbs. No. 1 Wrappers @ \$2.60	\$ 6.709.00
	137 lbs. Off Color (Short) @ \$1.00	137.00
		544.50
	Control of the contro	
	53 lbs. Filler @ \$.40 1798 lbs. 2nd & 3rd Pr. @ \$1.75 ²	3.146.50
		1.698.75
	1359 lbs. 6th Pr. @ \$1.25	
1	590 lbs. Tops @ \$1.00	190.00
		010 007 05
		\$12,897.95
	Advances	
	Cash Advanced	\$10,500.37
	Labor	711.98
	Rent	105.00
	Rent .	69.03
	Insurance	77 40
	Insurance	10
		811,463.78
		0 1 104 17
	Check Herewith	\$ 1,464.17

Received Payment:

(S.) JACK McFARLIN

Copy

EXHIBIT A-No. 26.

J. T. Budd, Jr. & Co. Quincy, Fla.

January 5, 1951

Mr. R. F. Hopkins Route 3

Cairo, Georgia

Statement of 1950 Packing Shade Tobacco

1093 fbs. No. 1 Wrappers (a \$2.19	
9 lbs. Off Color (Short) @ 2.00	9.00
38 lbs. Brokes @ \$1.25	47.50
598 lbs. 5th Pr. @ \$1.50	897:00
172 lbs. Tops @ \$1.00	172.00
	J
그림 그렇게 다른 사람들이 되었다. 그렇게 살아보니 얼마나 없다.	\$ 3,519.17.
• Advances	100
Cash Advanced	\$ 2,785.83
Labor	137.89
nenv	22.50
Baling Material	23.01
Insurance	
	\$ 2,990.00
Check Herewith	8 529.06

Received Payment:

ROBERT F. HOPKINS (S.)

Copy
EXHIBIT A-No. 27.

J. T. Budd, Jr. & Co. Quincy, Fla.

January 5, 1951

Mr. H. L. McKeon Quincy Florida.

Statement of 1950 Packing Shade Tobacco

10038 lbs. No. 1 Wrappers (a) \$2.35	
1579 lbs. Top Middles @ \$1.20.	1,894.80
644 lbs. Tops @ \$.50	322.00
	\$25,840.30
Advances	
Cash Advanced	\$18,543.20
Labor	941:27
Rent	165:00
\Baling Material	123.90
Insurance	122.61
: 1000년 1일	
	*\$19,895.98
Check Herewith	\$ 5.944.32

Received Payment:

(S.) H. L. McKEOWN

JAMES P. MITCHELL V. JOSEPH T. BUDD.	JR ST
R/	
Copy	
refrance a second	
ENHIBIT A—Ne [©] 28.	
J. T. Budd, Jr. & Co.	
Quincy, Fla.	
Jan. 9th 1951	
CT CD by P Williams	6
C. T. & Robert E. Williams	
Rt. § 2	
Whigham, Ga.	
Statement of 1950 Packing Shade Toba-	sco &
2787 lbs. Middles @ \$2.20	
207 lbs. Sand Leaves @ 65g.	131 55
396 lbs. Tops @ \$1.00.	390 (1).
	8 6,061,95
Advances	
Cash Advanced	\$ 3,900.00
Cheese Cloth	1,416.68
Labor	195.00
Rent	
Baling Material	35:40
Insurance	90
A CONTRACTOR OF THE CONTRACTOR	
	8 5 1625 38
Check Herewith	8 1,036 57

Received Payment: (S.) C. T. & ROBERT E. WILLIAMS By C. T. WILLIAMS

Copy

EXHIBIT A-No. 29.

J. T. Budd, Jr. & Co. Quincy, Fla.

Jan. 10th 1951

Mr. T. W. Fletcher Quincy, Fla.

Statement of 1950, Packing Shade Tobacco

Clark Shade	
3495 lbs. Wrappers @ \$2.05	8 7 161 95
191 ibs. Tops @ \$1.00	191 00
3 Acre Shade	
3 Acre Shade 3362 lbs. Wrappers @ \$2.20	\$ 7 300 10
329 lys. Tops @ \$1.10 Fletcher Shade	361 90
Treffict Chart	
3769 lbs. Wrappers @ \$1.845	8 6 953 81
353 lbs. Brokes @ 81.25	440.00
29 lbs. Filler (a. 40	11 60
437 lbs. Tops @ \$1.00	437.00
Jordan Shade	
1176 lbs. Wrappers @ 2.00	\$ 9 359 00
138 lbs. Tops @ 1.00	138 00
	120.00
	\$25, 146, 46

143	Advances	
nent		180 00 143 37
Check Herewith		821,673 84 8 3,772 69
Received Payment:		
E	Copy XHIBIT A—No. 30.	
/	T. Budd, Jr. & Co. Quincy, Fla.	
Mr. G. G. Thomas Calvary, Georgia Statement o	January 9, 1951 f 1950 Packing Shade To	bacco
1815 lbs. No. 1 Wrappers 97 lbs. Off Color (Short)	\$ @ \$2.30 @ \$1.00 \$2.25	8 4 174 50 97 00 186 25

144	
172 lbs. Tops @ \$1.00	172 00
Advances	8 6 752 20
Cash Advanced Cheeseoloth Labor	8 3,000 00° 1,767 18 303 52
Rent: Baiing Material Insurance	45 00
Check Herewith	\$ 5,184.15 \$ 1,568.05
Received Payment: (S.) G. G. THOMAS Copy	
J. T. Budd, Jr. & Co. Quincy, Fla.	
Mr. Worth Suber Route 2 Quacy, Florida	
Statement of 1950 Packing Shade Tobacco	
3919 lbs. Wrapper @ \$2.40 152 lbs. Off Color (Short) @ \$1.00 2105 lbs. Broks @ \$1.25	8 9 405 60 152 00 - 2 631 25

145				
31 lbs. Dar 1303 lbs. 5t	ler @ \$.40 k Tobacco @ th & 6th Pr. (ops @ \$1.00	@ \$1.50		1,954,50
	13. 3			\$15,470.05
	*17.50	Advances		
Labor Rent Baling Mat	***********			1.321.46
				ø
				817.718.18
Balance du	e ús.			\$ 2,247,23
Statemen	t Accepted as (8.)	WORTH SI	BFR	
		Copy		10 4 A 1 1 1 1 1 1 1 1
	E	XHIBIT A S	vo. 32.	
	• J.	T. Budd, Jr. Quincy, Fla		
Charlei Smi Havana		Jan. 10th 19	51	
	Statement o	f 1950 Packing	Shade Teles	and the
and II			THE RESERVE OF THE PARTY OF THE	
2209 lbs. W 89 lbs. Off (rappers @ \$2 Color (short)	(1.5 (d. \$1.00		\$ 4.749.35 89.00

146	
445 lbs. 7th Pr. @ \$1.50 385 lbs. Tops @ \$1.00	.667.50 385.00
Cash Advanced Labor Rent Baling Material	45.00 33.63
Insurance Check Herewith	\$\begin{array}{c} 34.19 \\ 8\begin{array}{c} 5.370.56 \\ 8\end{array} 520.29 \end{array}
Received Payment: (S.) CHARLIE SMITH Copy	
EXHIBIT A-No. 33.	
J. T. Budd, Jr. & Co. Quincy, Fla	
Jan. 10th 1951 Mr. A. M. Haire. RFD Chatahoochee, Fla.	
Statement of 1950 Packing Shade Tobacco	
2886 lbs. Middles @ \$2.30.	8 6,637.80

147			
358 lbs. Brokes @ \$1	25	117	50
66 lbs. Filler @ 40.		26	
624 lbs. T. M. & 6th	Pr. @ \$1.50.	936	
101 Tops @ \$1.00		401	
and the second second	The state of the s	8 8,535	70 .
With the state of	Advances		
Cash Advanced			
Labor		706	40
Rent		49.	
Baling Material		\ 40	71
Insurance	· · · · · · · · · · · · · · · · · · ·		$\bar{5}3$
		\$ 8,206	.38
Check Herewith		\$ 329	32
Received Payment			
Jr. 1	3 A.M. HAIRE		
148			
140	Copy	1 1	
			*
	EXHIBIT A—No. 34.		
	J. T. Budd, Jr. & Co. Quincy, Fla.		
	January 10, 1951		
Gregory Brothers	garding 10, 1021		
Havana, Florida			
Statemen	t of 1950 Packing Shade Tobacco		
15465 lbs. No. 1 Wrap 2546 lbs. Tops @ \$1,0		836,652 $2,546$	
		400 .00	
	Advances	\$39,198.	05
Cash Advanced		\$29,575.	50
Labor		1,272	
Rent.		195	
		203	
Insurance		197.	17
			2
Check Herewith	7.	\$31,443.	80
		\$ 7,754.	25
Received Payment:			
(8	GREGORY BROS. S.) B. L. GREGORY		

Copy

EXHIBIT A- No. 35.

J. T. Budd, Jr. & Co.: Quincy, Fla.

January 11, 1951

Mr. Raymond Poppell Concord Florida

Statement of 1950 Packing Shade Tobacco

. 899 lbs. No. 1 Wrappers @ \$2.18	\$ 1,959.82
• 39 lbs. Off Color (Long) @ \$2.00	78.00
10 lbs. Off Color (Short) @ \$1.50	15.00
35 lbs. Brokes @ \$1.25	
255 lbs. 4th Pr. @ \$1.75	
1 B. 120 G 2 10	
1 lb. Filler @ \$ 40	40
174 lbs. 6th Pr. @ \$1.25	21,7.50
64 lbs. Tops @ \$1.00 ·	64.00
	\$ 2,824.72
Advantes	0 -,0-11-
Cook Advances	2 1 mm 1-1
Cash Advanced	\$ 2,208.56
Labor	
Rent	22.50
Baling Material	17.70
Insurance	15.99
0.0	\$ 2,370.15
Check Herewith	\$ 454.57
Received Payment:	

RAYMOND POPPELL

Copy

EXHIBIT A-No. 36.

J. T. Budd, Jr. & Co. Quincy, Fla:

Jan. 10th 1951

Mr. W. B. Smith Havana, Flat

Statement of 1950 Packing Shade Tobacco

3394 lbs. No. 1 Wrapper @. \$2.37 353 lbs. 7th Pr. @ \$1.50 579 lbs. Tops @ \$1.00	8 8.043.78 529.50 579.00
	2 0 159 99
Advances	\$ 9,152.28
Cash Advance	\$.6,500.00
Cheese Cloth Labor	565.18
Labor	282.51
Rent	60.00
Baling Material	46.02
Insurance	43.02
	8. 7.496.73
Check Herewith	\$ 1.655.55

Received Payment:

(S.) W. B. SMITH By MRS. W. B. SMITH

Copy

EXHIBIT A-Xo.37.

J. T. Budd, Jr. & Co. Quincy, Fla.

January 11, 1951

Mr. Glover Kemp Havana Florida

Statement of 1950 Packing Shade Tobacco

771 lbs. No.1 Wrappers @ \$2,20	S	1.696720
29 lbs. Off Color (Short) (a \$1.00		29.00
35 108. Drokes (6 \$1.25		66 25
10 lbs. Filler @ \$.40.		4.00
267 lbs. 3 rd Pr. @ \$2.00		534.00
187 lbs. 6th Pr. @ \$1.25		235.50
189 lbs. Tops @ \$1.00		189.00
	8	2.753.05
Advances		-,,,,,,,,,,,
Cash Advanced	8	2.283.08
Rent		22.50
Eabor		111.78
Baling Material		
Insurance		. 16. 19
	-	
	S	2,450.38
Check Herewith	8	
Received Payment:		

Copy

EXHIBIT A-No. 38.

J. T. Budd Jr. & Co. Quincy, Fla.

Jan. 10th 1951

Ben Brown Rt. ∦2 Quincy, Fla

Statement of 1950 Packing Shade

665 lbs. No. 1 Wrapper @ \$2.40 370 lbs. Off Color (long) @ \$1.75 149 lbs. Off Color (short) @ \$1.50 281 lbs. Brokes @ \$4.25 55 lbs. Filler @ 40¢ 667 lbs. Tops @ \$1.00	647.50 223.50 351.25 22.00
Advances	\$ 3,507.25
Cash Advanced Labor Rent Baling Material	376.56 45.0
Insurance Check.Herewith	\$ 3,417.73 \$ 89.52

Received Payment:

(S.) BEN BROWN By ALVIE WOLF

Farmers Home Adm. Co. Sup.

\$ 6,362.40

Сору

EXHIBIT A-No. 30.

J. T. Budd Jr & Co. Quincy, Fla.

Jan. 9th 195!

Elijah McMillan Rt * 1 Box 136 Chattahoochee, Florida

Statement of 1950 Packing Shade Tobacco

3372 lbs. Middles @.\$1.70 \$ 5.732.40 600 lbs. Tops @ \$1.05 \$ 630.00

Advances

 Cash Advanced
 \$5,260.00

 Labor
 243.82

 Rent
 45.00

 Baling Material
 38.94

 Insurance
 39.72

 \$5,627.48

Check Herewith \$ 734.92

Received Payment:

(S.) ELIJAH McMILLAN

п		
м	200	

Copy

EXHIBIT A-No. 40

J. T. Budd Jr. & Co. Quincy, Fla.

January 8, 1951

Mr. C. C. Duke RFD1

Bainbridge, Georgia

Statement of 1950 Packing Shade Tobacco

4131 lbs. No. 1 Wrappers @ \$2.425	\$10,017.68
93 lbs. Off Color (Short) @ \$1.00	/ 93.00
431 lbs: Brokes @ \$1.25	538 75
89 lbs. Filler @ 8.40	35.60
89 lbs. Filler @ 8.40 669 lbs. Tops @ \$1.00	669.00
	\$11,354.03
Advances	
Cash Advanced	\$ 8,832.17
Labor	2 0,002.17
Port	DED 10
Reift Baling Material Insurance	90.00
Daning Material	49.56
Insurance	56.58
	\$ 9.571.44
Check Herewith	\$ 1,782.59
Received Payment:	

S.) C. C. DUKE

Copy

EXHIBIT A-No. 41

J. T. Budd Jr. & Co. Quincy, Florida

January 8, 1951

Mr. John B. Smith Route 2, Box 25 Quincy, Florida

Statement of 1950 Packing Shade Tobacco &

472 lbs, No. 1 Wrappers @ \$2.20	\$ 1,035.40
55 lbs. Off Color (Short) @ \$1.00	55:00
37 lbs. Brokes @ \$1.50	35.50
5 lbs Filler @ \$ 40	2.00
2205/lbs Middles @ \$1.35	2,976.75
2205/lbs. Middles @ \$1.35 332 lbs. Tops @ \$1.00	332.00
	· \$ 4,459.65
Advances	
Cash Advanced	\$ 4,937.98
Labor	208.27
Labor	37.50
Baling Material	33.63
Insurance	33.26
	Angelia de la Compania del Compania de la Compania de la Compania del Compania de la Compania del Compania del Compania de la Compania del Compania de la Compania del Compania de la Comp
	\$ 5,250.64
\sim	
Balance due us	. \$ 790.99
Statement Accepted as Correct:	

JOHN B. SMITH

	1			
156				
•	-/-	Copy		
	ЕХНІВІ	T A-No. 42	1.00	
		idd Jr. & Co. ney: Fla.		
Mr. Carl Haire	Janut	ry 8, 1951		
Gretna			Sept. Select	
Florida	60			
3 " Start	desired of roto	D. Miller of the	Marine E	
	ement of 1950		ie Tobacco	1
5534 lbs. No. 1 V	Vrappers @ \$2	.1.1		\$11,842.76
480 lbs. Tops @	\$1.00		0	480.00
				812.322.76
	. As	lymees		912,022,00
, Cash Advanced.		Acres 18 Contract		\$ 6,336.39
Labor:				602.20
Rent	Beer hall the bear and a			67.503
Baling Material				5.1
Insurance				
A Park of the second				8 7.119 25 .
Check Herewith				8 5,203 51
Received Payme	₹	9	. /	53
received 1 ayine	(S) CAR	LHAIRE	1.	

70		
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EXHIBIT A-No. 43.

J. T. Burld Jr. & Co.

January 2, 1951

J. C. Bentley Greensboro, Fla.

Statement of 1950 Packing Shade Tobacco.

3142 lbs. No. 1 Wrappers @ 8.244	8 7:666.48
	125.00
	315.00
202 108. Diokes to 1.20	8 00
	4.80
	477.00
	$_{\circ}1,989,00$
571 lbs. Tops @ 1.00	571,00
	811,438,28
Advances	
	8 9 747 13
Labor	. 493.65
Pant	67.50
	65.49
Daining Material	
Insurance	01.3/1
And the second s	216 492 21
	\$10,435.71
Check Herewith	\$ 1.002.57
	\$11,438,28
	Cash Advanced Labor Rent Bahng Material Insurance

	-	ı.
-		

Received Payment: ..

(S.) J. C. BENTLEY

Copy

EXHIBIT A-No. 11.

J. T. Budd Jr. & Co., Quincy, Fla.

January 5, 1951

Joe McNair Havana Florida

Statement of 1950 Packing Shade Tobacco

								9	8	3.947	66
			$\overline{\mathrm{Ad}}$	yai	ace:	S	1				
Cash Advanced	l						1		. 8	2.979.	138
Labor							. 0			132.	37
Rent										30.0	90
Baling Materia	d. r.									21	2
Insurance										.21.:	2.
									-		
St. St. St. St.									8	3,184	5
Check Herewit	h						· · · .		8	763.	00

Received Payment:

(8.) JOE MCNAIR By E. H. ROWAN

Copy

EXHIBIT A-No. 45.

J. T. Budd Jr. & Co. Quincy, Fla.

January 5, 1951

Mr. P. J. Hammett Cairo Georgia

Statement of 1950 Packing Shade Tobacco

650 lbs. No. 1 Wrappers @	\$2.43	's	1,579,50
45 lbs. Off Color (Long) @	\$2.00		90.00
36 lbs. Off Color (Short) @			. 36.09.
36 lbs. Brokes @ \$1.25			45.00
15 lbs. Filler @ \$.40			6.00
			491.75
			892.00
			857.50
			870.00
			187.00
		8	5,054.75
	Advances		
Cash Advanced		S	4,373.73
Labor			. 189.01
Pont			20 00

160		
Baling Material Insurance		30:09 29:00
	\$ 1	,651,83
Check Herewith	8	402.92
Received Payment: (S.) P. J. HAMMETT		
Copy		
EXHIBIT A-No. 46.		
J. T. Budd Jr. & Co. Quincy, Fla.		
January 4, 1951 Mr. Jeff Shelfer		
Quincy Florida		
Statement of 1950 Packing Shade Tobacco		
6-A Shade 7569 lbs, No. 1 Wrappers @ \$2.45 912 lbs, Tops @.\$1.03		3,544.05 939.36
16-A Shade 10490 lbs, No. 1 Wrappers @ \$2.85 3535 lbs, 2nd Pr. @ \$2.02 1933 lbs, Tops @ \$1.015	7	,700.50 ,140.70 ,962.00

161	
Hillside	
6413 lbs. No. 1 Wrappers @ \$1.975 994 lbs. Tops @ \$1.00	\$12,665.68 994.00
Cash Advanced Labor Rent	\$67,946,29 \$20,307,91 3,049,30 450,00
Baling Material Insurance	. 302.67 319.46
	\$24,429.34
Check Herewith	\$43,516.95
Received Payment: (S.) J. SHELFER	
Copy EXHIBIT A-Xo. 47.	
J. T. Budd Jr. & Co. Quincy, Fla.	0
January 4, 1951 Mr. Herbert H. Clark Route 1 Chattahoochee, Florida	
Statement of 1950 Packing Shade Tobacco	
4866 lbs. No. 1 Wrappers @ \$1.88 1814 lbs. Tops @ \$1.00	\$ 9,148.08 1,814.00
	\$10,962.08

162	
Cash Advanced Labor Rent, Baling Material Insurance	\$ 9,207.76 421.09 75.00 67.26 65.82
Check Herewith	\$ 9.837.93 \$ 1.121.15
Received Payment: (S.) HERBERT H. CLARK Copy EXHIBIT A—No. 48.	
J. T. Budd Jr. & Co. Quincy, Fla.	
Mr Joe MeNair Calvary Georgia	
Statement of 1950 Packing Shade Tobacco	
6895 lbs. No. 1 Wrappers @ \$2.27 449 lbs. Tops @ \$1.10.	\$15,651.65 493.90
	\$16,145.55

163 Advances	
Cash Advanced Labor Rent Baling Material Insurance	\$15,048,67 655,98 75,00 67,26 73,44
	\$15,920.35
Check Herewith	\$ - 225.20
(S.) JOE McNAIR Copy EXHIBIT A—No. 49. J. Te Budd Jr. & Co. Quincy, Fla.	
January 4, 1951 Mr. Arthur Womack Hayana Florida	
Statement of 1950 Packing Shade Tobacco	
10854 lbs. No. 1 Wrappers @ \$2.175 2154 lbs. Tops @ \$1.00	\$23,607.45 2,154.00
	\$25,761.45

164 Advances -	
Cash Advanced Labor Rent Baling Material Insurance	1,540,30 120,00 113,28
	814,903,62
Check Herewith	\$10,857.83
Received Payment: (S.) A. WOMACK Copy EXHIBIT A—No. 50. J. T. Budd Jr. & Co. Quincy, Fla.	
January 4, 1951 Mr. Leo Harrison Route 2 Whigham, Georgia	
Statement of 1950 Packing Shade Tobac	co
4346 lbs. No. 1 Wrappers @ \$2.275 431 lbs. Tops @ \$1.065	\$ 9,887,15 459.02
	\$10,346.17

165	
Allvances	
Cash Advanced Labor Rent Baling Material Insurance	428.02 45.00
	\$ 7.211.39
Check Herewith	\$ 7.211.39 \$ 3,134.78
Received Payment:	
(S.) LEO HARRISON	
Copy	
EXHIBIT A-No. 51.	
J. T. Budd Jr. & Co. Quincy, Fla.	
Mr. D. E. Vickers	*
Route 2 Whigham, Georgia	
Statement of 1950 Packing Shade Tobacc	0
1950 lbs. No. 1 Wrappers @ \$1.75. 565 lbs. Tops @ \$1.00	\$ 3,412.50 565.00
	\$ 3,977.50
Advances	
Cash Advanced	\$ 1,878.33
Labor	
Rent	30.00

166		
Baling Material Insurance		26.55 25.15
	\$ 2.1	24.36
Check Herewith	\$ 1,8	53.14
Received Payment: (S.) D. E. VICKERS		
Сору		
EXHIBIT A-No. 52.		
J. T. Budd Jr. & Co. Quincy, Fla.		
Tylear Sanders Quincy, Florida		
Statement of 1950 Packing Shade Tobacco		
2127 lbs. No. 1 Wrappers @ \$2.20. 396 lbs. Tops @ \$1.08	\$ 4.0	79.40 127.68
	\$ 5.1	07.08
Cash Advanced Labor Rent		299 03 163 45 30 00

167	
Baling Material Insurance	$26.55 \\ 25.23$
Check Herewith	\$ 4,544.26 \$ 562.82
Check Helevith	0 002.02
Received Payment: (S.) TYLEAR SANDERS, JR.	
Сору	
EXHIBIT A-No. 53.	
J. T. Budd Jr. & Co. Quincy, Fla.	
Mr. J. G. Rudd	
Route 3 Quincy, Florida	
Statement of 1950 Packing Shade Tobace	0
2087 lbs. No. 1 Wrappers @ \$2.12 61 lbs. Off Color (Long) @ \$2.50	\$ 4,424.44 122.00
31 lbs. Off Color (Short) @ \$1.50.	
43 lbs. Brokes @ \$1.25	
13 lbs. Filler @ \$.40	
219 lbs. Tops @ \$1.00	219.00
	\$ 1,870.89

Advarces		
Cash Advance	8	1.370 93
Labor		1727.94
Rent		•30.00
Balling Material		28, 32
Vinsurance		125.81
	S	1,628.00
Check Herewith	S	242,89

Received Payment:

s.) J. G. RUDD

Copy

EXHIBT A-No. 53a.

Trived States Department of Agriculture Farm Security Administration

1 - 3 - 51

J. T. Budd & Co. Gentlemen—

Mr. John G. Rudd has paid maturities in 1950. Therefore, in final settlement on tobacco for 1950, his check need not be made joint.

Yours reuly, (S.) ALVE WOFL Co. Supr.

Copy . &-

EXHIBIT A-No. 51.

J. T. Budd Jr. & Co. Quincy, Fla.

2 January 1951

Mr. R. H. Barley Route 3

Cairo, Georgia

Statement of 1950 Packing Shade Tobacco

106 lbs. Tops @ \$1.00.	190,00
Advances	\$ 5,978.90
Cash Advanced Labor. Rent	\$ 4,891.88 -208.05 -30.00
Byling Material Insurance	35,40 32,01
	8 5,197:34

Check Herewith
Received Payment:

(S.) R. H. BARLEY

170

Copy

781.56

EXHIBIT A-No. 55.

Suber & Johnson A No. 185

Quincy, Fla. 1–31 1951, Load of Hay From Pluckett Bros To Joe Budd Stable Driver, on-off Fees Gross Wt, 30095 lbs, Tare 13140 lbs, Net Wt, 16955 lbs.

Net Bush . .

(S.) JR J Weigher

Copy

EXHIBIT A-No. 56

Received of J. T. Budd, Jr. 8224.65 for 16955 Flay @ 2056

(S.) W. D. MOORE

Copy

EXHIBIT B-No. 1

J. T. Budd, Jr. & Co Quincy, Fla.

Sept. 20, 1951.

Invoice:

H. Duys & Company c o C. C. Hamilton & Company

84/5 South Street New York, New York

Two (2) Bales 1950 Shade Crop Tobacco Bales No. 583 1714

584

341 Less 8-333 @ 81.00

Copy .

EXHIBIT B-No.2. -

J. T. Budd, Jr. & Company Quincy, Fla.

January 16, 1951

Invoice:

Wedeles Brothers .

321 W. Lake Street Chicago, Illinois

C. T. & Robert Williams, S.L.- i Bale

No. 314 - 195 - 4 - 1918 @ \$1.25

Fied Loose Leaves - 1 Bale

No. 709-195-1 155* @ .75.

8 = 238.73

116.25.

355, 00

Copy

EXHIBIT B-No. 3.

J. T. Budd, J. & Company Quincy, Fla.

Aug. 10, 1951

Invoice:

H Duys & Company, Inc.

106 Wall Street

New York, New York

Thirty-Eight (38) Bales 1950 Crop Tobacco

Clint	Bassett-Tops-2	Bales
	201	Hink
	297	153

Gregory Brothers Tops-12 Bales

	362		.1	67%	
	361	₹.	1	66	
	366			65	
	367			66	
	368		1	66	
	369			66	
	370			67	
	371			67	
	372			68	
	373			69	
	374			64	
	.975			1200	

509	-164
510	163
511	162

```
Hopkins
                 5th Pr.
            587
                         1194
            144
                         118
            580
                         147
            590
                         146
 Leo Harrison-
                      3 Bales
            238
                         132*
            239
                         132
            240
                         132
Howard Suber-
                 Tops-5 Bales
            103
                         151%
            104
                         149
            105
                         150
            106
                         1.50
            107
                         152 .
Henry Davis-7th Pr.
                        2 Bales
           519
                         1734
           520
                         171
Total 1950 Crop.
                                         6093* Loss 152* -
                               5911 (a $1.00)
                                                      85,941,00
175
                               Copy.
                      EXHIBIT B-No. 4.
                     J. T. Budd & Company
                       · Quincy, Florida
                          July 27, 1951
Wedeles Brothers .
    321 Lake Street
        Chicago, Illinois
Seven (7) Bales 1950 Crop Tobacco
No. 207
                  115%
     208
     208A
                  144
    1 (30)0)
                  176
     594
                  180
     706
                1918
                 177
                 1172g Less 12 - 1144s (a.$1.00)
```

Copy

EXHIBIT B No 5.

J. T. Budd, Jr. & Company Quincy, Florida

July 8, 1951

H. Duys & Company, Inc.

J06 Wall Street

New York (5) New York

Seven Bales (7) 1950 Crop Tobacco

Arthur Womack—7th Pr 427 1608 429 161

430 151 431 159 432 159

434 ... 162 437 ... 160

1122* Net @ \$1.00

Copy

EXHIBIT B-No. 6.

J. T. Budd, Jr. & Company Quincy, Florida

December 18, 1950

Wedeles Brothers

177

321 West Lake Street Chicago 6, Illinois

9 Bales Florida Wrapper Tobacco—1950 Crop

461 John B. Smith, 2nd Pr. - 166 - 4 - 161

462 ditto 3rd Pr.—161

463 ditto 3rd Pr. 464 464 ditto 3rd Pr. 460

482-12-170 lbs

465 John B. Smith, 5th Pr. 163
 465 John B. Smith, 5th Pr. 163

466 ditto 165 467 ditto 165

168 ditto 163 169 ditto 160

816-20-7961

1128 lbs? (a. \$1.50 —\$2.142.00

Copy

EXHIBIT B-No. 7.

J. B. Budd, Jr. & Co. Quincy, Fla.

25 October 1950

Invoice:

Wedeles Brothers

. 32r W. Lake Street Chicago, Illinois

One (1) Bale Wrappers—John B. Smith, 2nd Pr.

Bale No. 460-169* Less 4*-165*, @ \$1.50:

Copy

EXHIBIT B-No. 8.

J. B. Budd, Jr. & Co. Quincy, Florida

Dec. 1, 1950

Invoice:

Meerapfel Agricultural Corporation

Quincy

Florida

To:-

One (1) Bale Light Wrapper—Sandleaf—Bale No. 1037—11″—164% Less 18—160% @ \$2.50—

	•			1. 10 100, 3 1	121
179					
	8.	\mathbf{C}	opy .		
		ЕХНІВІТ	B-No.		1
			I. Jr. & Co		
Invoice:		Country	, Florida .	Time	ns: 3% Cash
H. Duys d	Company, 1	ne.		100.11	res of Casu
	all Street lew York 5, 2	Vew York			
To:-					
	Bales Sandle:	d Wrappe	rs-1500 C	rop	
No. 13	1568	6.1			•
18	157				* 200
52 51	.461 .154	4			
55	151				
55	163		1		
67	161			/	
108	161			1.	
	11168 Less 2	88-1088	§ (a 83.50	per lb.	8-3,803-00
180 .				/	
	-		ppy		63
	E	XHIBIT	BNo. 10	0.	
		I. T. Bude	I, Jr. & Co		
Invoice:		Quine	y, Fla.	Spenier 1	or south
	Company, I	ne		Terms:	3°, 30 days
106 W	all Street				
. N	ew York 5, A	Y			
4 Bales Lt.	Wrapper—N	lids.			
No. 450	155%				
186 -	149				
207	162				
391	-151				
	617* Less 1	68 -6013	@ \$3.00		\$ 1,803.00
2 Bales Lt.	Wrapper-S	D.			
No. 14	163%				
61	163				
	3268 Loss 8	4-3184	@ \$3.50		\$ 1,113.00
					-
	Total.				\$ 2,916.00

Copy

EXHIBIT B-No. 11.

J. T. Budd, Jr. & Co. Quincy, Fla.

Invoice:

Wedeless Brothers 321 W. Lake Street Chicago, Illinois

Clint Bassett-Tops-5 Bales

No:	295	160	
	296	161	
	=298	159.	
	299	159.	
	300	159	

798* -- 20* 778* (@ \$1.50.

\$ 1,167,00

189

Copy

EXHIBIT B-No. 12.

J. T. Budd, Jr. & Co. Quincy, Florida

March 2, 1051

Invoice:

Reyes Cigar Company Quincy

Florida

To:

One (1) Bale 1950 Shade Hammett Crop, Bale No. 611 & 364 60

Copy

EXHIBIT B-No. 13...

J. T. Budd, Jr. & Co. Quincy, Fly.

April 15, 1951

Invoies:

Mr. Ivis J. Scaciron Quincy

Florida

Six (6) Bales Pull Outs-

175 175 174

1051* Less 24*-1027 * Net @ .60

616.20

Terms: 3° Cash

(1950 Crop)

Copy

EXHIBIT B-No. 14.

J. T. Budd Jr. & Co. Quincy, Fla.

May 7, 1951

Invoice:

Wedeles Brothers 321 W. Lake Street

Chicago, Illinois

Four (4) Bales H. L. McKeown Tops (1950 Shade).

15fx . 1710 150 £ 00\$ 173A 152

603* Less 16* -587* @ \$1.15

EXHIBIT B-No. 15.

J. T. Budd, Jr. & Co. Quincy, Florida

Oct. 25: 1950

Terms: 3% 30 days

Invoice: H. Dusy & Company, Inc.

106 Wall Street

New York (5) New York

Five (5) Bales Sandleaves: Loose Leaves

No. 174* 65

76 161

98 169

99 163 .

100 165

Less 208 -812* Net @ .60

per lb.-

Eighteen (18) Bales Looseleaves:

153 166% .187 167

204 167.

174 205

177 236

281

338 . 170

.375 164 $\begin{array}{ccc} 185 & & & \\ & 426 & 175 \\ & 467 & 181 \\ & 573 & 180 \\ & 624 & 176 \\ & 683 & 177 \end{array}$

22498 Less 528 - 2198 Net @ 8.60 per lb. | 8 1/318/20

Copy

EXHIBIT B-No. 16.

J. T. Bodd Jr. & Company Quancy, Fla.

Oct. 30, 1950

Invoice:

Meerapfel Agricultural Corp.

Quincy, Florida

Eleven (11) Bales Light Wrapper Sand Leaves

11" 1026 1157 13." 1027 165 12" 1928 1119 100 1029 .13" 14" 1030 12" 1031 162 134 1032 161

```
186
     1033 .
              14"
                      168
     1034
              13/14
                      1570
                      167
     1035
              12/13
                      158
     1036 •
              11/12
                     17924 -
                              44-1748 lbs. @ $2.50
Thirty-nine (39) Bales No. 2 Sand Leaves
                      1081
     1059
             157
                               163*
             157
     1060
                      1082
                               162
     1061
             163
                      1083
                              .176
     1062
             158
                      1084
                               163
     1063
             164
                      1085
                               163
     1064
             160
                      1086
                               158
    1065
             153
                      1087
                              160
             149
     1066
                      1088
                              161
    1067:
             147
                      1089
                              163
    1068
             157
                              162
                      1090
    1069
             161
                      1091
                             159
             16"
    1070
                      1091
                              158
             153
    1071
                      1093
                              161
    \frac{1072}{10.3}
             156
                      1094
                              169
             160
                      1095
                              464
    1074
                              159
             168
                     1096
    1075
                     1097
             1. .;
                              154
    1076
             170
                             156-6997 lbs. @
    1077
             162
             162
   · 1078
```

\$1.75

Total

\$15,039.75

Copy

EXHIBIT B-No. 17

J. T. Budy, Jr. & Company Quincy, Florida

Jan. 2, 1951

Ben E. Mann

221 East Chestnut Street Lancaster, Pennsylvania

Invoice

12 Bale 1950 Florida Wrappers

Jeff Shelfer-4 Bales

301 176

302 177

303 . 176

304 175

704-16-688* @ 82.50

8 1 720 00

Raymond Poppell-2 Bales

¥ 552 133¥

553 - 130

:263- S-2558 (a \$2.00

S 510 (a)

Rubin Fordan -2 Bales

\$ 566 168

567 166

334-8-326* @ \$2.75

\$ 8951.5

```
115
Glover Kemp
    592. 140×
    593 • 135
                 2678. (a 8250)
P. J. Hammett
         1534
    606
    607
         152
    608
         153
         158-12-116* @ 82.75...
                                                   8 5,020 50
                            Copy
                    EXHIBIT B-No. 48.
                    J. T. Budd, Jr. & Co.
                        Quiney, Fla. s
                      January 18: 1951
Invoice:
                                         Terms: Cash Less 39
II. Duys & Company, Inc.
  106 Wall Street
       New York 5, New York
To:-
14. Wrapper S. 1.—11 Bales @ $3.50
No. 1002 et 1658
    1008
          -158
          170
    1009
```

3.690.0

	-			
5				1
	100			
	189	14804		3.
	1014	156		
	1016	151		
	1019	155		
	1020	156	Marian Char	
	1025	152	19.	
	. 1030	150		
	1036	153	· Aller	
	1039	161		
	.1040	163		
4	1041	163		
	1042	137		
		2000	Your Artists	
	May a series	2196∗-	56% -2110% (u 83.50
	Arthur W	omack 5	Bales @ \$1.50	
	No. 428	169%		
	• 433			
	135			. 6
	436			
	138	160		
		8364	20% 816% @	\$1,50
	r. 10			
	Lt. Wrapp		S.Bales @, 83.0	W.
	No. 2010 2015	160 s		
	2015	152 159		
	2018	157		
	2024	148		
	2032	• 151		
	2055	161		
	2057	171		
		2000	23 1000 10	00'00
		1262*	-321230 ★ (a	23.00

190 :

20

Gregory Brothers—13 Bales @ \$2.00 No. 349 1678

 $\begin{array}{ccc} 350 & 168 \\ 351 & 174 \end{array}$

 $\begin{array}{rrr} 353 & 171 \\ 352 & 168 \end{array}$

 $\begin{array}{ccc} 354 & 171 \\ 355 & 168 \end{array}$

356 169 357 168 358 168

359 167 360 169

361 165

2193.8 - 52.8 - 2141.8 @ \$2.00

Joe McNair—2 Bales @ \$2.25 No. 273 1708 274 170

310s - 8s - 332s @ \$2.25

Jack McFarlin-2nd Pr. -6, Bales @ \$1.75

No. 521 160* 522 174

523 165

524 1637 525 164

525 - 164 526 - 162

9884-244-9648 @ \$1.75

Jack McFarlin-3rd Pr -7 Bales @ \$1.75

No. 527 164*

528 - 166

	VIII.		0					
100				2 .		or parties		
. 191	529	ter			1.0			
	530 :	164 159	*				-0	
	531	163			•			Carl tail
	532	162				100		
	533	167			•			
					9			
		11158	28*	-11.174	(a \$1.	75		1.954 75
Q D L	11						100	
No.		117*		(a) \$1.7:				
10.	613	118	1.					
	614.	148						1
	614A	148	a .					
	1							
		591	-10%	-575×	@ \$1.7.			1.006.25
Glen	Griffit	h2 6 E	Bales @	81.75				
No.	252.	172						
	253	172				· .		
	254	169						
	255 -	173						
	256	171						
	257	171						
		Acces						
	in the state of	1028*	-21*	-1001*	@ \$1.7	$5, \dots$		1,757 00
C. T	Willia	ms-3	Bales (a \$1.75				
No.	197	161*						
	198	161						
	199	159						
								. Daire
	1	481*	12* -	160*	@ \$1.75			820.75

,	40						
192				4.5%			
/ 1	vivini.		2				
()	. Willia	ms 2 Bales	(0.51.75)			, P	
· .No.	200	183*		3.3.	9	(Table)	
	201	187 🚜					
		3704 - 84	-362× @	81.75		8 633 50	
		ndischam 3					
6 1	Vanja	ndusiaam 3	Bales (a	81.70			
No.		159%	1				
	119	159					
	120	161					
		1700 1	155. June.	1001-			
		179* Less'	24 -1073	e (11.51.1	•1	817, 25	
Wor	th Suber	-7 Bales @	\$1.75			Q	
No	453	1578					
	154.	158				7 .0 .0	
	435	45k					
	456	159					
. ·	457	160					
	18.	161				8	
	159	159					
						4.	
		1112* 28*	-1081* ((a \$1.75		1,897.00	
Mar	vin Subi	er- 5 Bales (r 84 75				
No.	247	1688					
	248	169					
	249	168					
	250	170					
	251	168					
	4						
		8138 - 208	-823s (a	81.75		1,440 25	

W: B 35mith-2 Bales @ \$1.75 No. 346 347 345 - 84 - 337 4 (0. 81.75)

D. E. Vickers-3 Bales @ \$2.00

No. 497 148* 498 150 499

450 Acss 12 = 138 (a \$2.00).

Otha Rowan-2 Bales @ \$1.75 No. 514 138* 142*

> 280%-S& - 272 (a \$1.75)

> > Total . . .

831,388,50

\$76.00

Copy

EXHIBIT B-No., 19.

J. T. Budd, Jr. & Co. January 5, 1951

Wedeles Brothers: 321 W. Lake Street.

Chicago, Illinois . J. C. Bentley-Tops-4 Bales @ \$1.50

No. 615 146* 616 . 148

194	. 0	
617 618	147 146*	86
	587* —16* —571* @ \$1.50 \$	856 50
Oscar Dean- No. 121 122	-7th Pr.—2 Bales 154* 156	
	310* Less 8*-302* @ \$1.50 ·	453.00
T. W. Fletch	ner-3 A Tops-2 Bales	
No. 188 189	157#- 158	
	315* Less 8* 307* @ \$1.50	460.50
Jones & Wat No. 190 191	tson—6th Pr:2 Bales 125** 125	•
	250* Less 8* -242* @ \$3.00	726.00
Steve Dolan No. 205 206	—8th Pr.—2 Bales 190* 188	
	378* Less 8* -370* @ \$2.50	925.00
W. C. Jones	-8th Pr6 Bales @ \$2.50	
No. 224 225	175 * 175	•
226 227	174 173	

	9	
195		
228	175	199
229	176	
	1048* Less 24* - 1024* @ \$2,50	2,560,00
Marvin Sul	er-No. 1 Tops-2 Bales	g
	ChiSA	
246.	168	•
	336* Less 8* -328* @ \$1.50	492.00
Joe McNai	r-5th Pr _{s5} -3 Bales	
No. 258	182*	1 1 1 1
259	183	
-260	182	
. 0	547* Less 12* - 535* @ \$2.75	\$ 1,471.25
Joe McNai		1 1 1
No. 493 494	180* 182	
495		
196	179 183	
11300	183	
	724* Less 16* - 708* @ \$2.75	8 1,947c00°
Joe McNan	-7th Pr7 Bales	
No. 261	160*.	
262	159	B - 3
263	162	
264	160	
265		
266	163	
267	158	
	The state of the s	
	1126* Less 28* —1098* (a \$2:50	2:745.00

277 134 401* Less 12* -389* @ \$1.50; A. M. Haire - Tops - 2 Bales

157

161

No. 278

279

318* Less 8* -310* @ \$3.00

A. M. Haire—Tops—2 Bales No. 280 182 281 191

Carl Haire—9th Pr.—2 Bales No. 451 1518 452 149

300* Less 8* -292* @ \$1.50

373* Less 8* -365* @ \$1.50

2.036.25

583.50

 $930.00 \cdot$

547:50

\$ 2,361 90

948.00

Brothers- 3 172* 5 171* 343* Clark—7t	.Lêss 88	2 Bales @		
3 172 % 5 171 % 343 %	.Lêss 88			
3 172 % 5 171 % 343 %	.Lêss 88			
343*	Less 8	- 33. s. (a \$1.50	
343*	Less 8	- 33. (c	a \$1.50	
		- 33.4. (9 81 50	
			A	
	1 11	no de	0.	1
		Bales		
0 182*		9		\ <u>\</u>
				1
				. <)
3 178				
4 180		•		
o sitt				
1010-	1000		'	
14+117	Less 30	4-1014	(0.81.50	
	1 170 2 178 3 178 4 180 5 178 6 181 7 177 8 177	1 170 2 178 3 178 4 180 5 178 6 181 7 177 8 477	1 170 2 178 3 178 4 180 5 178 6 181 7 177 8 477	1 170 2 178 3 178 4 180 5 178 6 181 7 177

628* Less 16* -612* @ \$1.50.

W. T. Suber—Tops—3 Bales No. 485 180*

 $\begin{array}{c} 472 \\ 473 \end{array}$

158* 155

 $\frac{157}{158}$

Q CES		
. 198	27	
486	181	
487	180	
	541 Less 120 - 520 @ \$1.50	S 793.00.
No. 3 541	1718	
542	473	
543	174	
541-	173	
7545	173*	
547	175	
548 %	174	
	1901 - 1 - 5 20 - (0-0) / 5 21 - 5	10
	1391* Less 32* -1359* (a. \$1.50)	8, 2, 038, 50°
- Jack McFa	erlin—Tops—3 Bales	
No. 549.	173*	
550	190	
551	183	
	3100 1 100 101 00 00 10	
	546* Less 12* - 534* @ \$1.50	\$ 801,00
Raymond I	Uoppell—6th Pr.—1 Bale	
No. 558	178* Less 1* -171* @ \$1:50.	8 261 00
G. G. Thor	nas-8th Pr3 Bales	
	1498	
579	149	
580	152	
	450* Less 12* - 439* (a \$2.50).	\$ 1,095,00
G. G. Thon	nas-9th Pr -1 Bale	
No. 581	163* Less 48 - 1598 (a \$1.50	* \$ 238.50
	And the second s	

```
-199
 Glover Kem-Tops-1 Bale
              1918 Less 14 - 1874 (a $1.50)
 G. G. Thomas-7th Pr. -3 Bales
 No. 575
              145% .
      576
              145
      577
              134
             424% Less 12-412% (a. 82.75
                                                       $ 1.433 00
                                                       $28,107,00
                              Copy
                      EXHIBIT B-No: 20:
                        January 2, 1951
 Invoice:
 Constantino Gonzales Y Ca.
     79' Wall Street
         New-York 5, New York
60 Bales 1950 Florida Wrappers:
 No. 126
          150
                ¥ 393
     145
          157
                  394
                       140
                  413
          159 :-
     161
                       160 .
                  415
     163
          166
                       162
     176.
                       156.
          169
                  490
   虚177
          170
                       137
                  548
     178 \cdot 163
                  549
                       141
```

188

189

10

170

155

153

159

550

597

611

612

138

162

158

155

					1.			
001.								
	195	162	639	163				
	200	162	643	169				
	201	163	660	169				
	202	173	669	154				
	203	162	673	163				• \
	210°	180	681	167				Yo
	215	456	682					
	216							the second
				•				
	219	161 /		0646-	-210 - 9	106 a	81.75	* \$16,460 50°
	221	159	21	Roles	1050 F	orida W		. 7 P
		161	116	16.1	s 491	161	tappers.	
	231	157	143	162	572	162		
	235	163	111	153		149		
		100	4	14.3.		MII .		
	214	169	160	164		2205 6	1-3281*	
	245	Lta4	162	159			50	4.921.50
		A		1		6.0	Catholic	1.321.00
19	216	170	190/	143		. Tot	al .	821,382.00
	247	172	286	177				
	258	163	305	158				
	259	155	306	163				
	263	160	323	158				
	278	185	331	161				
	79	167 3	384	163				
	286	157	395	141				
	113	163		158				
	37	161	445	167		11 11		
	149	162		165		1 1		
	64	159	466	165.				
	61 -	163		168	•			1 77 27 28
	62	163						
. 3	68°	168		٥				
				4				
- 3	74	155		g	6 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1			

- 10 First the tobacco referred to in Request Number 9 above as being sold by defendants to customers located without 203—the state of Florida has been or will, in the normal course of business, be removed from defendants warehouse to points without the state of Florida.
 - (S.) WILLIAM S. TYSON Solie For.
 - (S) BEVERLEY R. WORKELL.

 Regional Attorney.
 - (S) Robertson C. Hesse.
 Attorney, United States Department of Labor. Attorneys for Plaintiff.

Certificate of Service. (Omitted in printing)

201 IN UNITED STATES DISTRICT COURT

Asswer to Reguest for Ammiston of Facts. Filed April 10, 1952

Come now the defendants in accordance with the requirements of Rule 36. Federal Rules of Civil Procedure, and admit the request made to the defendants in the manner following:

1. The defendants admit the statement of fact contained in Pagagraph 1 of the Request for Admission of Fact.

2. The defendants admit the statement of fact contained in Paragraph 2 of the Request for Admission of Fact.

3. The defendants admit the statement of fact contained in Paragraph 3 of the Request for Admission of Fact.

4. The defendants admit the statement of fact contained in Paragraph 4 of the Request for Admission of Fact.

5. The defendants admit the statement of fact contained in Paragraph 5 of the Request for Admission of Fact.

.6. The defendants admit the statement of fact contained in Paragraph 6 of the Request for Admission of Fact.

205 7. The defendants admit the statement of fact contained in Paragraph 7 of the Request for Admission of Fact.

8 The defendants admit the statement of fact contained in Paragraph 8 of the Request for Admission of Fact.

9. The defendants admit the statement of fact contained in Paragraph 9 of the Request for Admission of Fact.

10. The defendants admit the statement of fact contained in Paragraph 10 of the Request for Admission of Fact.

CALDWELL, PARKER, FOSTER & WIGGISTON,

By (S) JULIUS F. PARKER.

Attorneys for Defendants

2016

IN UNITED THE DISTRICT COURT

Notice of and Motion for Continuance Filed April 17, 1952 To: Julius F. Parker Attorney for the Defendants.

Please take notice that on the 21st day of April 1952, at 10 o'clock in the foresoon of that day or as soon thereafter as counsel can be heard, at the Courtroom of the Court in the City of Tallahassee, State of Florida the didersigend will move for a general continuance of the above entitled action, because there are not sufficient trads available to the plaintiff with which to pay the costs and expenses necessarily incident to a trial of this cause. Plaintiff states, however, that such funds will be available to him after June 30, 1952, the close of the fixed will be available to him after June 30, 1952, the close of the fixed year, and that thereafter he will stand ready for trial at any date convenient to the Court and counsel.

Dated the 16th day of April, 1952.

IS WILLIAM S. Treos

Solutitor.

S.) Beverley R. Worrell,

Remonal Attorney...

ROBERTSON C. HESSE.

Attorney.

Noted States Department of Labor.
Attorneys for Plaint #.

207

Certificate of Service (omitted in printing)

IN UNITED STATES DISTRICT COURT

ORDER CONFINCING CAUSE April 21, 1952

On this day, for good and sufficient cause shown the Court, it is ordered by the Court that this case be and the same is now hereby continued until such future date as may suit the convenience of the Court.

Dated the 21s day of April 1952 .

(S) Dozier A DeVane?

District Judge

208

IN INITED STATES DISTRICT COURT

STIBULATION FOR SUBSTITUTION OF PARTY PLAINTIFF Filed Februs

It is hereby stipulated that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, his appointment as Secretary of Labor, by Dwight

D. Eisenhower, President of these United States, having been confirmed by the Senate of these United States on January 21, 1953, and that said Martin P. Durkin has succeeded to all the rights, duties and functions heretofore vested in the plaintiff, Maurice J. Tobin, former Secretary of Labor, and that said Martin P. Durkin, Secretary of Labor, may be substituted herein as plaintiff in the place and stead of the said Maurice J. Tobin, and that an order may be entered herein to that effect and that this cause may be continued and maintained by said Martin P. Durkin as Secretary of Labor.

Dated this 2nd day of February, 1953.

(S.). WILLIAM S. Tyson;

Solicitor

(S.) Beverley R. Workell., Regional Attorney.

S. ROBERTSON C. HESSE,

Attorney.

United States Department of Lubor.
Attorneys for Plaintiff

Joseph T. Budd, Jr., Et al.,

By (S.) JULIUS F. PARKER,

Attorney for Defendants.

209 %

In United States District Court

ORDER OF SUBSTITUTION Filed February 11, 1953

The parties hereto having stipulated that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such he has succeeded to all the rights, duties, and functions of Maurice J. Tobin, heretofore appearing as the Secretary of Labor, United States Departs ment of Labor and the plaintiff in this cause; and that said Martin P. Durkin, Secretary of Labor, be substituted as plaintiff by rein in the place and stead of said Maurice J. Tobin, it is.

Ordered that Martin P. Durkin, Secretary of Labor, he and he hereby is substituted as plaintiff herein in the place and stead of Maurice J. Tobin, former Secretary of Labor, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said Martin P. Durkin, Secretary of Labor.

Dated this 11th day of February, 1953.

(S.) Dozier A. DeVane, United States District Judge. IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIEF FOR SUMMARY JUDGMENT Filed August 3:

Comes now the plaintiff by his attorney and hereby noves the court to enter summary judgment for the plaintiff, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings, interrogatories, answers to interrogatories; requests for admissions and admissions of facts; and all other documents and papers filed in this cause and all the proceedings heretogore had herein, show that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter or law.

(S.) STUMET ROTHMAN.

Soliritor.

(S) BEVERLEY R. WORRELL. ..

Regional Attorney,

(S) H. GRADY KIRVEN.

Attorney, Knited States Department of Labor, Attorneys for Plaintiff

Certificate of Service (omitted in printing)

211- MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT-Eiled August 5, 1953

Come now defendants, by their undersigned attorneys, and move the Court to enter summary judgment for the defendants on the grounds that the pleadings, interrogatories, and answers thereto, admissions of fact, and other evidentiary matters filed in the cause show that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

(S.) Joan T. Wigginton,
Of Caldwell, Parker.
Foster & Wigginton.
Attorneys for Defendants.

Certificate of Service comitted in printing)

IN L'NITED STATES DISTRICT COURT

MEMORANDUM DECISION-Filed and entered September 29, 1953

U.S. Type 62 Sumatra tobacco is a leaf tobacco grown and used extensively for-eigar wrappers and grown exclusively in two areas in Florida and one small area in Georgia. The principle area where this tobacco is grown is in Gadsden and Leon Counties, Florida and in Decatur and Grady Counties, Georgia, contiguous to the Florida

counties named above. All this type of tobacco grown in these counties is grown within an airline radius of thirty miles of the town of Quiney in Gadsden County, Florida and is processed and packed in packing houses located chiefly in and around Quiney. In the Quiney area of production there are 300 farmers growing this type of tobacco of which 80% grow and harvest less than 25 acres per year. A small amount of this type of tobacco is also grown in Madison County, Florida.

History of Litigation.

Plaintiff Originally brought suit against Joseph T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company, to enjoin this company from violation of the Fair Labor Standards Act (29 USCA; Sec. 201 et seq). This suit was instituted on February 10, 1951. The facts in the case, as disclosed by the pleadings and supporting evidence filed in the case, show that the Budd Company grows no Type 62 tobacco, but operates

a packing house where it processes the tobacco grown by

At a pre-trial conference held in February, 1952, after the case was at issue, it developed that of the 11 remaining packing houses in the Quincy area processing type 62 tobacco for shipment and sale, and who had not complied with the Fair Labor Standards Act, 6 processed, in addition to tobacco grown by themselves, tobacco grown by others, and the remaining 5 processed tobacco grown by themselves alone.

It was obvious to the Court, at the conclusion of the pretrial conference, that the Budd Company operation was in violation of the Fair Labor Standards Act. A decision to that effect in that ease would have adversely affected the 6 other operators not in compliance with the Act, who process and pack tobacco grown by small farmers. It also appeared to the Court at that time that any decision in the Budd Case would not immediately affect the packs. ing house operators who process their own tobacco exemsively, the overall result would have been disastrous to the small growers of Type 62 tobacco. Therefore, the Court insisted that before decision in the Budd Case, the Administrator bring suit against an operator processing tobacco grown exclusively by it, so that the Court could determine whether the Act was applicable to their packing house operations as well. The Administrator, accordingly, brought suit against the King Edward Tobacco Company of Florida. This suit was filed on March 23; 1952. The May Tobacco Company intervened and is a party defendant in this suit.

214 The nature of the alleged violations in the King Edward Tobacco Company case are the same as those alleged in the Budd case. When this gase became at issue on the pleadings and supporting evidence introduced by the parties, detendant King Edward Tobacco Company, filed a motion on summary judgment contending that the essential facts were not in suppute and that on the undisputed facts defendant is exempt from the Fair Labor. Standards Act, under Glauses (6) and (10) of Section 213(a) of the Act. Because of collateral factual issues raised by plaintiff in this case, which the glaintiff was unwilling to waive at that time, the Court was compelled to and did, deny defendant's motion for summary judgment.

At a pre-trial conference held in this case and in the Budd-case, on a later date, the Court announced to the respective parties that in its opinion the essential facts in each of these cases are not in dispute and that upon each party plaintiff and defendant waiving the unessential questions raised in the pleatings and supporting evidence by filing motions for summary judgment the Court would pass upon these motions and determine thether the operations of these defendants at their packing houses are subject to the Fair Labor Standards Act:

Due, however, to the effect such a decision would have upon these defendants, should the decision go adversely to them, by leaving all their competitors free from compliance with the Act until their cases were adjudicated, the Court further suggested, and the Administrator acquiesced in the proposal of the Court, that

Quincy area not in compliance with the Act and that these cases be brought to issue in the same way as the cases then before the Court. This has been done: There are 15 packing houses operating in this area. Similar suits are now pending against the operators of 12 of these packing houses, which are at issue. The essential facts in each case are not in dispute and the sole question before the Court is whether packing house employees are exempt under Clauses (6) and (10) of Section 213(a) of the Act.

The Court is now in position to render judgment in all these cases that will be applicable to all of them alike at the same time and no injustice will be done anyone, however the cases may go. The remaining 3 packing houses have complied with the provisions of the Act.

Method of Growing, Harvesting and Marketing Type 62 Shade Leaf Tobacco.

Type 62 shadwheaf tobacco requires special and painstaking cultivation, harvesting curing and preparation for market. It grows in fields enclosed in a cheesecloth shade, which completely covers and incloses the tobacco field. The cheese cloth is supported by wires strung on posts placed at regular intervals through the fields.

It is highly tertilized and intensively cultivated during the growing period. When each leaf reaches a certain stage of naturity it is prohiptly harvested. This harvesting process is known as "princing". The lower leaves are picked first, perhaps not more than two or three from each stalk. This picking is repeated as the tobacco matures on up the stalk until all the marketable leaves have been removed. At each priming the tobacco is immediately taken to a tobacco barn located on the farm where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried the drying process is interrupted and it is permitted to absorb moisture and again dried. This diving process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the packing house.

It is then taken from the barns in the field, placed in appropriate containers and carried to the packing house where it is placed in piles known as "bulks" for curing. Each bulk consists of more than 3000 lbs. of tobacco. The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco. During the curing period the temperature within each bulk is closely watched from day to day and at regular intervals, when the appropriate time has arrived, the bulk is broken up, the tobacco leaves shaken out and those on the outside placed on the inside of the new bulk and those on the inside placed on the outside for further curing. This process is continued until the tobacco is ready for market when it is bailed for shipment.

In the Quincy area, for the year 1950, approximately 2554 acres were planted to type 62 shade leaf tobacco. Of this total acreage 1459 acres were grown by companies operating packing houses that handled no tobacco save that produced by them. Small producers owning no packing houses but depending on others for the preparation of their tobacco for market grew 784 acres and the packing houses that processed this tobacco also grew and processed for their own account 311 acres.

The Budd Case.

The Budd Company grows no tobacco for its own account, but processes and prepares for market in its packing house tobacco grown by others. For the year 1950 this company processed the tobacco grown by 52 small farmers on 263 acres. The Budd Company entered into a contract with each of these farmers under which each farmer theoretically took over the packing house with all its equipment and the employees (approximately 108) of the Budd Company for the processing of his own boacco and sold the tobacco, when processed, to the Budd Company. A system of bookkeeping was set up by which each farmer paid to the Budd Company the actual cost of the processing of the tobacco grown by him,

and the Budd Company paid the employees. During the year 1950, 333.889 lbs. of tolerero of these 52 farmers was processed in the Budd Company's packing house. It was all purchased by the Budd Company. The Budd Company sold 231.209 lbs of this tobacco to the Budd Cigar Company, a corporation of Quincy. Figures. The remainder of the tobacco was sold to other persons firms or corporations, much of which went into precisate convenience.

Little need be said a sto the plan adopted by the Budd Company to encumvent the Fair Labor Standards Act. The arrangement was conceived and put into effect solely for this purpose. This law may not be circumvented in this manner and the plan

adopted did not accomplish the result desired. The Budd at 248 Company operations are clearly subject to the provisions of the Fair Labor Standards Act, with reference to the compensation of all employees working on the tobacco of in connection therewith in the Budd packing house. Farmers Reservoir & Irrigation Co. v. McComb. 337 U.S. 755; McComb w. Super-A Fertilizer Works, Inc., 165 Fed. 2nd, 824.

The King Edward Tobacco Company Case.

In the King Edward Tobacco Company case the facts are entirely different from those in the Budd case. During the year 1950 the King Edward Tobacco Company cultivated 206 acres of Type 62 shade leaf tobacco. The process of growing, harvesting and drying this tobacco in the barns on the farms where the tobacco was grown and in bulking, curing and preparing the tobacco for market in the packing house was the same as that generally outlined heretofore.

When the tobacco reached the stage in the process of curing, when it was ready for the packing house, the King Edward tobacco Company took it to one of its packing houses where no other tobacco was processed and made ready for market.

The King Edward Tobacco Company operates two other packing houses where tobacco grown by others is processed and made ready for market and defendant concedes that these packing house operations are subject to the Act, but as it uses the packing house involved in this suit to process tobacco grown only by it, it claims

exemption for this operation from the provisions of the Act.

The tebacco processed by the defendant in this packing house is sold chiefly to an affiliate of the defendant.

The packing house in question is located within the corporate limits of Quipey. Florida and is not located on any of the farms operated by defendant. In this case the issue is whether the packing house employees are entitled to the benefits of the Fair Labor

Standards Act or whether defendant's operations are exempt therefrom under Clauses (6) and (10) of Section 213(a) of the Act.

Plaintiff concedes that all labor employed in the growing, harvesting and handling of the tobacco up to the time it reaches the platform of the packing house is exempt, but as soon as this tobacco is delivered to the packing house, all employees engaged in the handling of it thereafter or who work in any other capacity in confection with its handling, are subject to the Ayt. Defendant's pestion is that the farming operation in connection with the handling of this tobacco does not cease until the tobacco is prepared for market and negle ready for shipment, which would exclude every employee in the packing house working thereon or in connection therewith.

This question has been before the Court in numerous cases and there is some conflict among the decisions as to where the farming exemptions and and the Wages and Hours provisions of the Fair Labor Standards Act applies. Comp. Fleming v. Farmers Peanut Co. (5th Cit.), 128 Fed. 2nd, 404 and Puerto Rico Tobacco Marketing Cooperative Ass'n v. McComb (1st Cir.), 181 Fed. 2nd, 697.

On the same day the Court of Appeals, 5th Circuit, decided 220 Fleming v. Farmers Peanut Company, supra, it also decided Fleming v. Jacksonville Paper Company, et al., 128 Fed. 2nd, 395. While the Court of Appeals reverted the Jackonville Paper Company case the reversal was on very narrow grounds, as disclosed by the Opinion in that case. The Administration carried the Jacksonville Paper Company case to the United States Supreme Court—see—Walling, Adm. v. Jacksonville Paper Company, 317 U. S., 564. The Supreme Court affirmed the judgment of the Court of Appeals, 5th Circuit, reversing the District Court in that case, but in so doing held the Court of Appeals adopted the narrow a construction of the Act in its Opinion in that case.

In all cases it is not easy to draw the line, but based upon the reasoning in the later cases it is not difficult to draw the line in this case. This Court finds and holds that upon the record in this case the farming exchaption ends when the tobacco reaches the receiving platform of the packing house for processing and packing purposes for use or sale in the market. The Court considers is unnecessary to labor this point as this question has been sufficiently considered and expounded in the cases relied upon by this Court to sustain its findings and holdings therein. Walling, Adm. v. Jackonville Paper Company, 317 U. S., 564; Farmers Reservoir & Irrigation Co. v. McComb. 337 U. S., 755; Mailaua Agr. Co. v. Manega, 97 fed. Supp., 198; Calafay, Gonzales, 127 Fed. 2nd, 934; Vines, et al., v. Serralls, 145 Fed. 2nd, 552 and Walling Adm. v. Connecticut Co. 154 Fed. 2nd, 552. Having found and held that the farming ex-

emption ends when the tobacco reaches the receiving plat-221 terms of the packing house, it is unnecessary to consider the relative scope and effect of Clauses (6) and (10) of Section 213 (a con the Acten this case.

May Tobacco Company Case:

The May Tobacco Company case is in every respect similar to that of the King Edward Tobacco Company case. The May Tobacco Company grew 90 acres of Type 62 shade leaf tobacco in 1950 and spacessed in its packing house tobacco grown exclusively by it. For the reasons stated above with reference to the application of the Fair Labor Standards Act to the King Edward Tobacco Company the Court finds and holds that the packing house operations of the May Tobacco Company are also subject to the provisions of the Act.

An appropriate judgment will be entered in the Budd Case, the King Edward Case and the May case in conformity with this Memorandim Decision.

What the Court has held in the Budd Case, the King Edward Tobacco Company Case and the May Case is equally applicable to each of the other cases pending before the Court and upon plaintiff filing a motion for summary judgment in each case a short memorandum decision, referring to the decision in these cases, will be filed in those cases and a final judgment entered in each case accordingly.

Dated at Tallahassee, Florida, this 29th day of September, 1953.

(S.) Dozier A. DeVane,

United States District Judge.

IN UNITED STATES DISTRICT COURT

CEDER FOR SUBSTITUTION OF PARTY PLAINTIEF—Filed November 14, 1953

It having been satisfactorily shown to this Court that James P. Mirchell is the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such Secretary of Labor. United States Department of Labor, he has succeeded to all of the rights, duties and prerogatives of Martin Pa Durkin, heretofore appearing as the Secretary of Labor, United States Department of Labor, and the plaintiff in this cause, and it appearing that there is substantial need for continuing and maintaining the above entitled action, it is, therefore, on notion of attorneys for plaintiff.

Ordered, Adjudged and Decreed that the said James P. Mitchell, Secretary of Labor, United States Department of Labor, be, and he

hereby is, substituted as plaintiff herein in the place and stead of Martin P Durkin; formerly Secretary of Labor, United States Department of Labor, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said James P. Mitchell, Secretary of Labor, United States Department of Labor.

Dated: November 13, 1953.

(S.) Dozier A. DeVane, ... United States District Judge.

223 Plaintiff moves for entry of the above order.

(S.) STUART ROTHMAN.

Solicitor.

(S.) BEVERLEY R. WORRELL,

Regional Atterney.
(S.) H. Grady Kiryen.

Attorney, United States Department of Labor.

Attorneys for Padintiff.

Defendants consent to entry of the above order.

Caldwell, Parker, Foster & Wigginton,

By (S.) LULIUS F. PARKER,

· Attorney's for Defendants

IN UNITED STATES DISTRICT COURT

Supplemental Memorandum Decision and Order—Filed December 17, 1953

Defendant. King Edward Tobacco Company, has filed herein a motion to revise certain statements of facts contained in the Memorandum Decision herein, which will be considered and disposed of seriatum.

1. On page #5 of the memorandum decision defendant moves to delete the sentence. This drying process is repeated until the tobacco has reached a stage in the process of curing when

224 it is ready for the packing house", and substitute in lieu thereof, "This drying process is continued until the tobacco is moved from the barn to the packing plant", or words to the same general effect.

The Court finds no appreciable difference in the meaning and effect on the language used in the memorandum decision and in the revision requested by counsel for defendant and the motion in this respect is denied.

2 Counsel for defendant also moves the Court to delete from page \$7 the following sentence. When the tobacco reached the stage in the process of curing when it was ready for the packing house the King Edward Tobacco Company took it to one of its packing houses where no other tobacco was processed and made ready for market, and substitute in lieu thereof. When the tobacco is moved from the barn it is taken to one of the packing plants of King Edward Tobacco Company in which the tobacco of no other grower is handled, or words to the same general effect.

The Court finds no factual difference in the meaning and effect of the language used in the memorardum decision and in the revision requested by counsel for detendant. Each correctly state the facts, but the Court will adhere to the language used in the memorardum decision and the motion in this respect is also denied.

II. Counsel for defendant further moves the Court to delete the words. The packing houses are equipped with machinery 225 for the appropriate humidification, and curing of the tobacco, appearing in page #5, upon the ground there is no evidence or showing that the packing plants are equipped with machinery.

This statement may be accurate as to the case made out by King Edward Tobacco Company, but upon the whole record before the Court it clearly and very definitely appeared that the packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco and no harm is done to King Edward Tobacco Company case by retaining this language in the memorandum decision. Motion to delete is therefore denied.

III. Counsel for defendant further moves the Court to delete words appearing near the bottom of page #7 as follows: "and defendant concedes that these packing houses operations are subject to the Act", on the ground that the affidavits or evidence hereigh do not show that defendant "concedes" or admits that such operations "are subject to the Act", but such evidence shows at most that the defendant is not in violation of the Act at such other packing houses.

Obviously in cases of this character the Court has latitude, in expressing in its own banguage what the facts in a case show. The facts in this case clearly established that defendant operates two other packing houses in the same area; that these packing houses are not involved in this litigation because they were found not to be in violation of the Act. While the Court could have used some word more pleasing to defendant than "concedes" the effect would have been the same and for this reason the

6 Court sees no necessity for amending the memorandum decision as requested. The motion to delete is denied. IV and V. Counsel for defendant further moves the Court to add to the paragraph ending on page #6 immediately preceding the heading, "The Budd Case", the following:

"A majority of the employees who work on tobacco in the packing plant also work part of the time on the tobacco farms".

and in support thereof defendant has filed and requests the Court to receive and consider an affidavit of recent date filed herein by Robert F. Gardner, which shows that on October 21, 1953 at the heighth of the packing season of type #62 eigar leaf wrapper to-bacco, a survey was made of the employees of the King Edward Tobacco Company present and working on that date in and about the packing plant involved in this suit and that 83 of the 93 employees present had worked continuously with this type of tobacco on some tobacco farm from the time of planting until the date of survey, including participation in the growing, harvesting and barn curing of such tobacco.

At the time of the trial it was repeatedly asserted by counsel for defendants and never denied by counsel for plaintiff that more than 50% of the employees who worked on tobacco in the packing plant also worked part of the time on the tobacco farms and this memorandum decision may be considered as a finding of this additional fact.

227 Counsel for plaintiff moves the Court to amend the memorandum decision heretofore filed herein by striking therefrom on page ±9 thereof, the following:

"Having found and held that the farming exemption ends when the tobacco reaches the receiving platforms of the packing house it is unnecessary to consider the relative scope and effect of Clauses (6) and (10) of Section 13(a) of the Act in this case," and substitute in lieu thereof, the following:

"The natural form in which the tobacco matures in the field has been substantially changed in the drying and redrying process before it reaches defendant's plants. Operations in the bulking houses constitute processing of a type not enumerated in Section 13(a) (10) and that Section, therefore, has no application to the employees there engaged in those operations."

The ground assigned for the change is that the proposed language is amply supported by the facts in this case and would eliminate any possible uncertainty as to the Court's ruling.

The Court is not convinced that anyone will be confused by the language used and further is unwilling to accept and approve the limited approach to the question at issue in this case suggested in the proposed language. Therefore, plaintiff's motion to amend is denied.

The May Tobacca Company of asc

the parties and the fourth were laboring ander the in tessue that metrops feet summerly preference to be the first tessue that metrops feet summerly preference, bad been field by blooming and feed and have been field by blooming and feed and have plaintiff nor detendant had filed such motion. Each has now filed a mation for summerly pudgment; with notice to the Court that he further hearing therein is requested and the Court having considered said motions and being fully accessed in the premises adheres to the decision heretefore reaches in the May Tobacco Company case in its prior memorandum decision and pursuant thereto, it is

Ordered and adjudged that intervener's motion for summary

judgment be and the same is hereby denied.

It is further Ordered and Adjudged that plaintiff's motion for summary judgment against the May Tobacco Company, Intervenerabe and the same is hereby granted.

Done and Ardered at Tallahassee, Florida, this 17th day of @ December, 1953.

(S.) Dozier A. DeVane, United States District Judge

999

In United States District Court

The above styled cause came on for hearing before this Court, sitting without a jury, on cross motions for summary judgment heretofore filed by the respective parties. Upon consideration of the pleadings and the stipulations, affidavits and other evidence filed herein and this cause having been submitted to the Court on the entire record and the arguments and briefs of counsel for the respective parties, and findings of fact and conclusions of law having been made and filed herein.

Now, therefore, sufficient cause therefor appearing and dpen the findings of fact and conclusions of law contained in the nemoran-dum decision fil-d herein and date! September 29, 1953, is amended, it is

Ordered, Adjudged and Decreed that the defendants, Joseph T. Budd, Jr., and Florence W. Budd, copartners, doing business as I. T. Budd, Jr., and Company, their agents, servants, copployees, attorneys and all persons acting, or claiming to act, in their behalf and interest, be, and they hereby are, permanently exponeds and restrained from violating the provisions of Sections 15(a) (1), 15(a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938

as amended (Act of June 25, 1938, 52 Stat. 1060, as amended by 63 Stat. 910, U.S.C. Ti. 29, Sec. 201, et seq.), hereinafter referred to as the Act, in any of the following manners:

Act, pay to any of their employees who are engaged in the production of goods for interstate commerce, as defined by the Act, wages at rates less than seventy-five (75) cents and hour.

(2) The defendants shall not, contrary to Section 15(a)(1) of the Act, ship, deliver, transport, offer for transportation or sell in interstate commerce, as defined by the Act, or ship, deliver or sell with knowledge that shipment, delivery or sale thereof in interstate commerce is intended, any goods in the production of which any employee of the defendants has been employed at rates of pay less than those specified in paragraph (1) of this judgment.

(3) The defendants shall not fail to make, keep and preserve records of their employees, and the wages, hours and other conditions and practices of employment maintained by them, as prescribed by the regulations of the Administrator issued, and from time to time amended, pursuant to Section 11(c) of the Act and found in Title 29, Chapter V, Code of Federal Regulations, Part 516.

It is further Ordered that nothing in this judgment shall be construed to prevent the shipment, delivery or sale by defendants in interstate commerce of any goods which they may now have on hand in the production of which they of their employees may have heretofore been employed in violation of Section 6 of the Act.

231 It is further Ordered that costs be, and they hereby are, taxed against the defendants for which execution may issue. Dated this 30th d v of December, 1953.

(S.) Dozier A. DeVane, United States District Judge.

In United States District, Court

Notice of Appeal, Filed February 24, 1954

Notice is hereby given that Joseph T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company, defendants in the above and foregoing action, appellants in the United States Circuit Court of Appeals, do hereby file this, their Notice of Appeal, and appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment entered herein on January 4, 1954, and duly recorded in Civil Order Book No. 4, at Page 4029, which said judgment is the final judgment in said cause, said appeal being taken within sixty (60) days from the entry of said final judgment as required by the Rules of Practice of this Court. Said Appeal is made returnable as provided by

law and the Clerk is hereby requested to give notice hereof forthwith.

Caldwell, Parker, Foster & Wigginton

By (S.) Julius F. Parker.

Attorneys for Defendants.

232-234 Cerfificate of Service (pmitted in printing)

Cost bond on appeal for \$250.00 filed February 24, 1954, omitted in printing.

235 In United States District Court

MOTION TO STAY INJUNCTION PENDING APPEAL Filed February 24, 1954

Come now defendants, Joseph T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company, 236—and pray for an order staying the permanent injunction granted herein by the final order of this Court 2 and December 30th, 1953, and entered herein on January 4, 1954, during the pendency of the appeal taken from said final order to the Fifth Circuit Court of Appeals.

Dated this 24th day of February, 1954.

Caldwell, Parker, Foster & Wigginton,
By (S.) Julius F. Parker,
Attorneys for Defendants

Certificate of Service (omitted in printing)

In United States District Court

Order Granting Motion to Stay Injunction Pending Appent— Filed and entered February 24, 1954

This cause came on to be heard upon motion of the defendants, Joseph T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company, for an order staying the permanent injunction granted herein by final judgment of this Court dated December 30, 1953, and entered herein January 4, 1954, during the pendency of appeal taken from said final judgment to the Court of Appeals for the Fifth Circuit, and good cause appearing therefor, it is

Ordered that a stay of said permanent injunction and final judg-

ment is hereby allowed, without additional bond, during the pendency of said appeal.

Dated at Tallahassee, Florida, February 24th, 1954.

(S.) Dozier A. DeVane. United States District Judge.

In United States District Court

POINTS TO BE RELIED UPON ON APPEAL—Filed March 2, 1954

The Court erred in the entry of its judgment against the Appellants in this cause;

2. The Court erred in holding that the Appellants and their employees are covered by the Fair Labor Standards Act, or any part thereof;

3. The Court erred in holding the farming exemption as to Type 62 tobacco ends when it reaches the receiving platform of a packing house for processing and packing purposes.

238-242 4. The Court erred in refusing to hold that the Appellants and their employees, and the employees of the farmers described in the Appellants respective admissions, were not evered by the Fair Labor Standards Act.

Respectfully submitted,

Caldwell, Parker, Foster & Wigginton,

By (S.) Julius F. Parker, Attorneys for Defendants.

Certificate of Service (omitted in printing).

APPELLANTS' DIRECTIONS TO THE CLERK FOR PREPARING TRANSCRIPT OF THE RECORD—Filed March 2, 1954 (omitted in printing)

243-244 Appellee's Designation of Additional Contents of Record on Appeal—Filed March 15, 1954 (omitted in printing)

245 Clerk's Certificate to foregoing transcript omitted in printing.

246 Minute Entry of Argument and Submission—January 31, 1955 (emitted in printing)

247 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15016

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY, APPELLANTS.

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPART-MENT OF LABOR, APPELLEE

AND

No. 45071

King Edward Tobacco Company of Florida and May Tobacco Company, Intervenor, Appellants.

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPART-MENT OF LABOR, APPELLE

Appeals from the United States District Court for the Northern District of Florida

Opinion—April 15, 1955

248 Before Hutcheson, Chief Judge, and Rives and Tuttle, Circuit Judges

RIVES, Circuit Judge: The opinion of the district Court in these cases is reported at 114 F. Supp. 865. The Budd case was the action first brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act 1 to enjoin the Budds from violating the minimum wage and record keeping provisions of the Act. At the conclusion of a pre-trial conference on that case, the district court was of the opinion that the Budd company operation was in violation of the Act, but, in order to avoid putting the small farmers, whose tobacco was processed by the Budds, at an economic disadvantage to the operators who processed their own tobacco exclusively, the court insisted that before decision in the Budd case, the issues be broadened to include such large operations.

¹ Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C.A. 201, et seq., as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910.

Accordingly, suit was brought against the King Edward Company and the May Company intervened.

Whe cases involve the definition of "Agriculture" under Title 29 U.S.C.A. Section, 203(f), the agricultural exemptions under Section 213(a), clauses 6 and 10, and incidentally the 223-249 emption from the maximum hours provision under Section 207(c).

2."(f) 'Agriculture' includes farming in all its branches and, among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141f(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultre, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations including preparation for market, delivery to storage or to market or to carriers for transportation to market."

3 "§.213. Exemptions

not apply with respect to "(6) any employee employeed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-erop basis, and which are used exclusively for supply and storing of water for agricultural purposes: (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or eanning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

"\$ 207. . Maximum hours" -

"(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this title shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural

All of appellant's processing operations are in connection with U.S. Type 62 Sumatra tobacco, which is a leaf tobacco grown and used entirely for cigar wrappers. This type of tobacco is grown exclusively in three counties in North Florida, and two counties in South Georgia contiguous to two of said Florida counties. Most of such tobacco is grown within an airline radius of thirty miles of Quincy, the County Seat of Gadsden County, Florida.

· We quote from the opinion of the district court:

"Method of Growing, Harvesting and Marketing Type 62 Shade Leaf Tobacco

"Type 62 shade leaf tobacco requires special and painstaking cultivation, harvesting, curing and preparation for market. It grows in fields inclosed in a cheeseeloth shade, which completely covers and incloses the tobacco The cheeseeloth is supported by wires strung on posts placed at regular intervals through the fields. It is highly fertilized and intensively cultivated during the growing period. When each leaf reaches a certain, stage of maturity it is promptly harvested. This harvesting process is known as priming'. The lower leaves are picked first, perhaps not more than two or three from each stalk. This picking is rejected as the tobseed matures on up the stalk until all the marketable leaves have been removed. At each priming the tobacco is im ordintely taken to a tobacco-barn located on the farm where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried the drying process is interrupted and it is permitted to absorb moisture and again dried. This drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the packing house.

The isthen taken from the barns in the field, placed in appropriate containers and carried to the packing house where it is placed in piles known as 'bulks' for curing. Each bulk consists of more than 3000 lbs, of tobacco. The packing houses are equipped with machiners for the appropriate humidification and curing of the tobacco. During the curing period the tobacco pera are within each bulk is closely watched from day to day and regular intervals, when the appropriate time has arrived,

or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this title, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

the bulk is broken up, the tobacco leaves shaken out and those on the outside placed on the inside of the new bulk and those on the inside placed on the outside for further curing.

The process is continued until the tobacco is ready for market when it is bailed (sict for shipment.) Durking v.

Budd, 114 F. Supp. 865, 866-867.

After such processing, this type tobacco falls into eight smain classifications, and none of those classifications can be determined prior to the processing. Primarily, because it cannot be graded until it has been processed, there is no market at an earlier stage for this type tobacco. The market variation dependent upon grading is considerable, ranging from a high of approximately \$2.40 per pound down to as low as \$.40 per pound.

REE

Some 300 farmers in the Quincy area grow this type of tobacco with about 80% growing and harvesting less than 25 acres per year, and a majority producing only 1½ to 10 acres per year. As has been noted, the natural heating, fermentation, and curing of this tobacco requires bulks of more than 3000 lbs, of tobacco. The small farmers do not grow the tobacco in such quantities, and hence, cannot process their own tobacco. For the year 4950, some 52 of such small farmers cultivating a total of 263 acres had their tobacco processed by the Budd Company. That company grows no tobacco of its own but processes tobacco grown by others.

During 1950, the King Edward Tobacco Company cultivated 206 acres, and the May Company 90 acres of this type tobacco, and those two companies processed their own tobacco, and did not handle the tobacco of any other person at the packing houses

here involved. Those packing houses are located in the town of Quincy, which, according to the 1950 census had, a population of 6.586, and the Budds' packing house is also in that town. At the height of the packing season, May employs approximately 70 employees in its packing plant, King Edward some 120 employees, and Budd approximately 108 employees. The majority of all such employees work also on the farms when not engaged in work at the packing plants. Other pertinent facts appear in the opinion of the district court.

King Edward and May claim that their employees are exempt from the provisions of the Act under Section 213 (a) (b) because they are employed in agriculture. As to King Edward and May, the appellee concedes that:

"Appellants are admittedly 'farmers' in their growing operations; and admittedly the mere fact that they are large growers does not affect the availability of the exemption to them insofar as they are in fact farmers." But obviously appellants are also something else in addition to being growers—they are also soperating separate and extensive commercial enterprises, of the same character as similar independently owned and operated packing houses."

The district court held "that upon the record in this case the farming exemption ends when the tobacco reaches the receiving platform of the packing house." III F. Supp. 868. We cannot agree. It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops, and that the work 253 of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes "practices performed by a farmer as an incident to of in conjunction with such farming operations, including preparation for market, within the meaning of Section 203(f)."

All of the appellants claim, that their employees are exempt from the Art by virtue of Section 213(a)(10), [see footnote 3, supra], because their operations are one of those enumerated in that section and necessary for the marketing of their crops, and because the Administrator exceeded his authority in excluding from the "area of production", "any city, town or urban place of 2,500 or greater population." Appellee concedes, as it must, that this Circuit has already held that the Administrator did so exceed his authority. Appellee insists, however, that after it reached the packing house, the tobacco was no longer an "agricultural or horticultural commodity", and that the processing operation was not one of those enumerated in the section. The legislative history of Section 213(a) (10) makes clear that its primary purpose was

See Addison v. Holly Hill Fruit Products Co., Inc., 322 U.S. 607, 614, 615, N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 2d, 184, 187, Waialua Agricultural Co. v. Maneja, 9th Cir., 216 F. 2d, 166, 474, 175.

^{**} Ste Farmers Irrigation Co. v. McComb, 337 U.S. 755; Addison v. Holly Hill Fruit Products Co. Inc.; 322 U.S. 607; N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 24, 184, 187; Waialua Agricultural Co. v. Maneja, 9th Cir., 216 F. 2d 466; American Sumatra Tobacco Corp. v. Tone. (Conn.) 15 Atl. 2nd. 80.

⁵th Cir. 215 F. 2d. 601. Cf. Tobin v. Traders Compress Co., 10th Cir. 199 F. 2d. 8. It seems particularly clear that the Administrator did exceed his authority as to the area of production be volved in this particular case.

to prevent discrimination against the small farmer. When 254 it is considered that admittedly the processing was essential for the marketing of the tobacco, again it stems clear to us that the employees of all of the appellants are exempt under Section 213(a) (10). Since we are of the opinion that the employees are exempt under Section 213(a) (10), we do not feel called upon to discuss the respective fields of operation of the total exemption in that section and of the partial exemption in Section 207(c) further than to say that we agree with the Ninth Circuit that such exemptions overlap and are not alternative.

s"Mr. Schwellenbach ... If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch, who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 to 10 acres, and who has to send his crop to a central warehouse, or who may join with others in a cooperative warehouse, and there have the same processes performed." 81 Cong. Rec. 7659.

But it seems that, so long as they remain in their natural state and all of the work that is done upon them is the or linary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered together in a cooperative, or turned over to a central warehouse they should be exempt, because of the fact that if we do not exempt them, we are giving the large producer a very distinct advantage over the small producer, and I am certain it is not the purpose of the bill and is not within the economic theory of the bill to give the large producer an advantage over the small producer." Emphasis supplied: 81 Cong. Rec. 7660.

Mr. Schwellenbach. The amendment is very strictly drawn in an effort to limit the operations defined therein purely to these of an agricultural nature. In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other tachners in a cooperative, or to send his apples to a packing house, and have these operations, which are gurely agricultural oper-

or residually exclusive. Wasokia Agricultural Co. v. Maneyi, 965; Cir., 178 F. 2a, 603, 609.2

Appeller insists, however, that Section 213 (a) (10) is inoperative until the Administrator makes a valid definition of the area of production. That much nev be granted, but in a case like this otherwise within the exemption, and which might likely fall with a valid definition of the area of production, the appeller is in no position to seek the equitable renedy & injunction until such descrition has been made. (6)

The judgments are therefore, reversed and the causes remanded with directions to enter judgments for the detendants, and for the intervenor, May Company.

ations, performed elsewhere than at the situs of the ranch or the

"The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and regetable producer." (Emphasis supplied.) 81 Cong./Rec. 7876.

• "In other words, the small producer cannot affer! to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill." SI Cong. Rec. 7877.

The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own warehouse and cannot with the larger producers, who can afford to maintain their own waret passes and their own washing machines and their own equipment. (Emphasis supplied). 81 Cong. Rec. 7877

Servalso, the dissenting opinion in Addison v. Holly Hill Co., 322 U.S. 607, at p. 633.

⁹ See Fleming y. Farmers Peanut Co., 5th Cir., 128 F. 2d, 404;
et. Puerto Rico Tobacco Marketing Coop. Assin v. McComb. 1st
Cir., 181 F. 2d, 697.

¹⁹ See Messenger v. Traders Compress Co. D.C. F. Dist Okla., 107 F-Supp. 354, 360; Walling v. McCracken County Peach Growers Assin, D.C. W. Dist, Ky., 50 F. Supp. 900, 905, 906. .256

In United States Court of Appeals

No. 15016

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR. AND COMPANY.

ersus.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR.

JUDGMENT-April 15, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to enter judgment for the defendants.

257 Clerk's Certificate to foregoing transcript or itted in printing.

258-259 Supreme Court of the United States

No. - OCTOBER TERM. 1955

. [Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

· Upon Consideration of the application of counsel for petitioner.

by is Guidened that the time for filing petition for writ of certionari in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1955.

Hyto L. Black.

Associate Justice of the Supreme

Court of the United States

Dated this Stlr day of July 1955.

Carried to

260

Supreme Court of the United States

278, OCTOBER TERM, 1955.

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a write of certior, ri to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duty certified copy of the transcript of the procedings below which accompanied the petition shall be treated as though filed in response to such writ-

LIBRARY SUPREME COURT. U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER.

VS.

KING EDWARD TOBACCO COMPANY OF FLORIDA
AND MAY TOBACCO COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIBCUIT

PETITION FOR CERTIORARI FILED JULY 29, 1955 CERTIORARI GRANTED OCTOBER 17, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR.
UNITED STATES DEPARTMENT OF LABOR.
PETITIONER,

KING EDWARD TOBACCO COMPANY OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEARS.
FOR THE FIFTH CIRCUIT

INDEX			
	Or	iginal	Petnt
Record from U.S.D.C. for the Northern District of	of Flor-		
ida, Tallahassee Division		1.	1:
Complaint		1	1
Answer of Defendant, King Edward Tobacco	e Com-		
pany of Florida to complaint			
Motion of defendant for summary judgment		b()	. 9
Affidavit of J. D. Vrieze		11	
Affidavit of Waldo S. Carrell	1000		10.
Plaintiff's response to motion of defendant K	mg Ed-		
ward Tobacco Co. for summary judgment		19	- 11
Affidavit of Wishiam H. Olson, Jr.		-	12
Affidavit of Robertson C. Hesse			14
Exhibit "A" Biographical descrip			
Wightman Wells Garner as it app			1
Nolume 25 of Who's Who in Americ	ra, page		
887	0	26.	. 15
Exhibit "B" Excerpts from "The tion of Tobacco" by Wightman			
Garner .		27	15
Department of Commerce Tabulation	· Fin-		
ployed persons 14 years old and o			
Major Industry Groups and S			
Quincy City, Gadsden County, F	lorida —		
April 1, 1950"		52	30

Record from U.S.D.C. for the Northern District of Flor- ida, Tallahassee Division—Continued	Original.	· Iran
Plaintiff's motion to strike affidavits supporting de-		Con III.
fendant's motion for summary judgment.		
Affidavit of Robert F. Gardner	60	32
	60	. 3.
Memorandam division on metron for summary judg-	The same of	
-ment	61	3.)
Order denying detendant's motion for summary judg		
ment Notice of Market	64	37
Motion of May Tobacco Company to intervene as de-		
fendant	na.	37
Answer of May Tobacco Company, intervener to com-		
plaint	68 .	. 39
Notice of hearing on motion of May Tobacco Company		
to intervene	7.75	4.5
Order allowing intervention of May Tobacca Company		
as party defendant	77	. 43
Stipulation of counsel for substitution of party plain-		
tiff	78	45
Order of substitution	79	45
Stipulation of facts.	80	'46
Plaintiff's motion for summary judgment	82	.47
Defendant's motion for summary judgment	83	48
Affidavit of J. D. Vrieze	84	48
Plaintiff's motion to strike portions of affidavit filed		
in support of defendant's motion for summary judg-	. *	
ment	93	53
Memorandum decision	97	55
Defendant's motion to revise statement of facts con-	100	
tained in memorandum decision.	107	61
Affidavit of Robert F. Gardner	110	63
Plaintiff's motion for summary judgment against		
intervener, May Tobacco Company	• 111	. 64
Stipulation of facts	112	64
Order of substitution of party plaintin	-111	65
Motion of intervener, May Tobacco Company, for		
summary judgment	116	66
Affidavit of Fred L. May	117	67
Plaintiff's response to defendant's motion to revise		
statement of facts contained in memorandum de-		
erdon	105	
Plaintiff's motion to amend conclusions contained in	125	
memorandum decision .	1000	2
Supplemental memorandum and order on motion to	125	e.1
revise statements contained in memorandum decision.		
heretofere filed and on plaintiff's and defendant's		
motion for summary judgment in May Case		-
Final judgment	130	(4)
Notice of appeal by defendant, King Edward Tobacco	136	
Co.	138	-

Record from U.S.D.C. for the Northern District of Fibr.		
ida, Taliahassee Division Continued	migne	
Notice of appeal by May Tobacco Company, inter-	. 4.	
vener	130	793
Recitation of filing of cost bond by King Edward		
1 Tobacco Co.	140	79
Recitation of filing of cost bond by May Tobacco Co.,		
Intervener	140	79
Motion of defendant, King Edward Tobacco Co. to		
stav injunction pending appeal	111	50
Motioncot entervener, May Tobacco Company, to stay		
injunction pending appeal	F12	50
Order granting motions to stay infunction pending		
appeal	143	51
Notice under Rule 75(n) Federal Rules of Civil Pro-		
cedure, filed by King Edward Tobacco Co.	143	51
Proposed statement of certain facts and proceed.		
ings not stenographically reported	145	. 40
Exhibit—Photostat of Columnar Clart	148	- 51
. Plaintiff's objections to defendant's proposed state-		
ment of facts under Rule 75(n), Federal Rules of		
Civil Procedure	149	85
Statement of certain facts and proceedings not stend		
graphically reported	· 1511	86
Notation relative to Exhibit Columnar Chart	152	56
Order approving revised statement of certain facts		
and proceedings not stenographically reported	- 153	87
Appellant's King Edward Tobacco Co., designation of .		
record (omitted in printing)	154	
Appellant's May Tobacco Company, designation of		
record (omitted in printing).	159	
Motion for extension of time to file record on appeal	160	88
Order extending time to file record on appeal	162	- 88
Clerk's certificate (omitted in printing)	163	
Minute entry of argument and submission committed in		
printing)	. 165	
Opinion, Rives, J.	166	89
Judgment.	175	. 96
Clerk's certificate countfed in printing)	176	
Order extending time to file petition for writ of certificari	177	94
Order allowing certiorari	179	97

a (Clerk's Note: The petition for writ observiously in this case seeks a review of separate judgments of USCA, 5th, entered on separate records in earlied two cases, pleadwas in which are materially different. For that reason, separate records have been printed.)

1 In the United States District Court for the Northern District of Florida, Tallahassee Division

Civil Agtion No. 340

MALRICE J. TOBIN. SECRETARY OF LABOR, UNITED STATES DEPARTS
MENT OF LABOR, Plainted.

PERSHS

King Edward Tobacco Company of Florida, a Florida Cobroration, Defendant

COMPLAINT-Filed March 28, 1952

Ι

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(1), 45(a)(2) and 45(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52), Stat. 1060, as amended by 63 Stat. 910; U.S.C. Ti. 29, Sec. 201, et seq.) hereinafter called the Act.

H.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Met.

Defendant, at all times hereinafter mentioned, was, and is, a corporation organized and existing under and by virtue of the laws of the state of Elorida by virtue of which it is licensed to do business and is doing business at 123 W. Washington Street, Quincy, Florida, within the jurisdiction of this Court, where it is engaged in the production, sale and distribution of tobacco.

W

At all times hereinaster mentioned desendant employed, and is employing approximately one hundred and twenty (120) employees in and about its said place of business and packing house (known as Packing House No. 1) in Quincy, Florida, is the production of tobacco for interstate commerce, within the meaning of the Act. Defendant repeatedly has violated and is violating the provisions of Sections, and 15 (a.c. 2) of the Act by paying to many of its employees for their employment in the production of goods for interstate commerce, as aforesaid, wages attracted less than seven
ty-five cents an hour during the period since January 25, 1950.

vi ·

On October 21, 1938, the Administrator of the Wage and Hour Division. United States Department of Labor, pursuant to the austhority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of the wages, hours and other conditions, and practice of employment to be made; kept and preserved by every employer subject to any provision of the Act. The said regulations and amendments thereto were published in the Federal Register and are known as Title 29, Chapter V. Code of Federal Regulations, Part 516.

VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated, and is violating, the provisions of Sections 11(c) and 15(a)(5) of the Act in that since on or about January 25, 1950, it has failed to make, keep and preserve adequate records of its employees and the hours and other conditions and practices of employment maintained by it, as required by the said regulations, in that the records kept by the defendant failed to show, among other things, the hours worked each workday, and each workweek.

4 . VIII

Defendant repeatedly has violated, and is violating the provisions of Section 15(a)(1) of the Act in that, since January 25, 1950, it has shipped, delivered, transported, offered for transportation and sold in interstate commerce and has shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in interstate commerce was intended from its said place of business at Quiney, Florida, to other states, goods in the production of which many of its employees were employed in violation of Section 6 of the Act as sileged.

Defendant has repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations have above, allegedly is, specifically authorized by Section 17 of that Act.

Wherefore cause having been shown, plaintiff prays paintagent permanently enjouring and restraining derendant, its officers agents, servants, employees attorneys and all persons getting or claiming to act on its behalf or in its interest from violating the provisions of Section 15(a)(2) and 15(a)(5) of the Ret, and such other and further relief as may be necessary and appropriate

WILLIAM S. TYSON

Soliertos.

Beverley R. Workell.

Regional Attorney
Robertson C. Hesse,

Attorney, United States Department of Labor, of Attorneys for Plaint

Post Office Address: Office of Solicitor.

> U.S. Department of Labor, 1908 Comer Building,

> > Birmingham 3. Alabama...

- In United States District Court

ANSWER-Filed May 6, 1952

Comes now the defendant King Edward Tobacco Company of Florida, a Florida corporation, by its undersigned attorneys, and for answer to the complaint says: [18]

Defendant admits the allegations of paragraph I of the complaint except that the defendant deties and says it is not true that the defendant has violated or is violating the provisions of said Fair Labor Standards Act.

11

Defendant admits that this Court has jurisdiction to restrain violations of Section 15 of said Fair Labor Standards Art, but the fendant denies and says it is not true that defendant has violated or is violating any of the designated provisions of Section 15 or any other provision of said Act.

111

Detendant admits the allegations of paragraph III of the complaint.

IV

(a) Defendant admits the allegations of paragraph IV of the compla at, but the defendant further alleges that the defendant is a tarmer, and that at all times mentioned in said complaint the delendar, was continuously and actively engaged in farming operations and was actively planting, cultivating, growing and harvesting tobacco on farms of the defendant in Gedsder County, Florida, all located within less than 25 miles of defendant's said packing house > 1. that at all times mentioned in said complaint the acreage of detendant's said farms actually and actively devoted to the growing: of such tobacco (known as "shade" acreage) was not less than 220 acres, and that defendanc's said packing house No. 1, as alleged in said complaint, is and was located in said City of Quincy at 123 West Washington Street; that all tobacco stored, packed or in any manner handled at defendant's said packing house No. 1 is and was at all times mentioned in said complaint, none other than tobacco which was and is planted, cultivated, grown and harvested on desendant's aforesaid farms, and not on or from any other farm or farms; and defendant further alleges that the employees of the defendant referred to in said paragraph IV of the complaint were engaged in work and practices all performed for and by the defendant as an incident to and in conjunction with defendant's said tarning operations, including the preparation of said defendant's tobacco crops for market.

(b) Further answering said paragraph IV, the defendant alleges alternatively, that defendant's employees referred to in said paragraph IV were at all times mentioned in said complaint all supplyed in an agricultural community and engaged in the handling, packing, storing, drying and preparing for market of cigar leaf tobacco in its raw or natural state, and that all such tobacco is and was at all times mentioned in the complaint planted cultivated grown and harvested on and from farms located in Godsden County. Florida, and within a distance of 25 miles from defendant's said packing house No. 1.

1.3

Deleadant denies the allegations of paragraph V of said complaint, and alleges that for the reasons and because of the facts become above set forth the employees of the defendant mentioned in said complaint are and the exempt from the provisions of said Act and that the defendant has not violated and is not violating the provisions of said Act.

VI

Defendant admits the allegations of paragraph VI of said complaint; but alleges that said regulations, or said Act, for the reasons and because of the facts hereinabove set forth are and were not applicable to the employees of said defendant mentioned and described in said complaint to the activities of the defendant described in said complaint.

VII

Answering paragraph VII of said complaint, the defendant damies that the defendant is subject to the provisions of said Act, and alleges that defendant has not violated and is not violating the provisions of said Act.

VIII

Defendant admits the allegations of paragraph VIII of said complaint, except that this defendant defines and says it is not true that this defendant has violated or is violating the provisions of said Act and defendant alleges that the employees of defendant mentioned in said complaint were not and have not been and are not being employed in violation of Section 6 of said Act or of any other provision of said Act.

IX

Answering paragraph IX of said complaint, defendant denies that the defendant has violated or is violating the provisions of said Act, and defendant further alleges that a judgment enjoining and estraining the acts of said defendant set forth in said complaint is not authorized by Section 17 of said Act or by any other provision of said Act.

Wherefore, the defendant prays judgment that said complaint be dismissed.

Edw. McCarthy.
Richard J. Gardner.
Attorneys for Defendant.

Of Counsel:

McCarthy, Lane & Adams, 423 Atlantic Bank Building, Jucksonville, Florida, Gardner and Lanes, Quincy, Fiorida.

(Certificate of Service Omitted.)

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT-Filed August 7, 1952

Comes now the defendant, by its undersigned counsel, and moves the Court for summary judgment on the pleadings and the affidavits hereto attached of J. D. Vrieze and Waldo S. Carroll and upon such affidavits as the plaintiff may offer at the hearing of this motion; and for grounds of this motion, defendant would show to the Court that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.

Edw. McCarthy, Richard J. Gardner, Attorneys for Defendant.

Of Counsel: McCarthy, Lane & Adams, Gardner and Lines.

11 AFFIDAVIT OF J. D. VRIEZE

STYTE OF FLORIDA, County of Gadsden:

J. D. Vrieze, being first duly sworn, deposes and says:

I am a resident of the town of Quiney, Gadsden County, Florida, and am employed by King Edward Tobacco Company, a Florida corporation, in the capacity of General Manager.

I have been engaged in the business of planting, raising, curing, buying, selling, warehousing and packing eigar leaf tobacco for a period of 32 years.

The King Edward Tobacco Company of Florida, of which I am General Manager, is engaged in the business of planting, raising, harvesting, curing, warehousing and packing of eigar wrapper leaf tobacco in Gadsden County, Florida. Said corporation is now and has been at all times mentioned in the complaint and answer filed in this cause operating shade tobacco farms in Gadsden County, Florida, having a total acreage of 4460 acres, including unember vated kind, whoodland and pasture, as well as 206.5 acres of land upon which eigar, wrapper tobacco, known as U.S. Type No. 62, was grown during 1952.

U.S. Type No. 62 tobacco is used exclusively for eight wrappers. It is grown only in Gadsden, Leon and Madison Counties, Florida, and in Decatur and Grady Counties, Georgia, and nowhere else in the world, unless in quantities that are inconsequential. The crop is grown in fields which are completely covered and enclosed with

a cheesecloth shade. The cost per acre of productions and the price per acre which the farmer receives for his crops are, to my knowledge the highest of all agricultural crops moduced in the United States, with the exception of other types of stapper tobacco grown in other sections of the county.

King Edward Tobacco Company owns and operates a warehouse in the town of Quiney, known as Warehouse No. 1, to which is bought and in which is bulked and packed shade-grown again wrapper leat tobacco (Type No. 62) produced exclusively one-suff company's tarms in Gadsden County, Elorida, all within a radiusy of 13 miles of said-Warehouse No. 1 in Quiney.

Within the corporate limits of the town of Quincy there also 12 other cigar leaf tobacco warehouses, to which warehouses are brought, bulked and packed shadegrown eight wrapper leaf tobacco produced in Gadsden County, Florida, also Leon County, Florida, and Decatur and Grady Counties, Georgia.

All the shade-grown tobacco (Type 62) grown in Leon and Gadsden Counties. Florida, and in Decatur and Grady Counties. Georgia, is produced within a radius of 30 miles from the town of Quincy. The average annual production of shade-grown Type 62 in this area is approximately five million pounds. On this average annual production an average of approximately three million pounds is brought to and warehoused in the town of Quincy.

The annual production of all agricultural products in Gadsden-County, Florida, amounts to applicamately \$12,000,000,000, 13 including all crops, cattle and other farm products; and the average annual production of shade-grown eight wrapper lear tobacco in Gadsden County, Florida, is approximately \$9,000,000,000,600, of which is brought to, bulked and packed in ware-houses located in the town of Quiney. Gadsden County, Florida, is an agricultural County and the town of Quiney is a predominantly agricultural community, the majority of whose inhabitants gain their hydibbood from and depend unon agriculture.

In ha vesting this type of tobacco, as each leaf reaches a certain state of maturity on the stalk, it is picked or "primed", the lower leaves being first picked, perhaps two or three from each stalk, and this "priming" is appeared from 4 to 7 times on up the stalk as the tobacco leaves mature. The leaves so picked are called first primings or "sand leaves" "second primings", third primings and so on. At each priming the leaves are immediately taken note the colong barn, strong and long on stocks to dry. Although leaves of several different primings are bung in the same bern at the same 1 inc. as each priming completely bases its green color and becomes a shade of brown, it is taken down, packed loosely in boxes and carried to the warehouse where it is placed in bulks.

each bulk containing between 3500 and 4500 pounds of tobacco. The transference from the curing barns to the bulks must be prompt in c.1. to avoid any harm'il stoppage or acceleration of the intra-cellular change—hat are continuously taking place within the leaf.

The entire process of the treatment or care of the leaf, from the time it is first hung in the tobacco barn after priming until the time that the bulk sweating is completed, is one entire and continuous process of natural transformation within the leaf itself necessary to make the leaf in its raw and natural state fit for the only use for which it is produced. Such care of wrapper tobacco, as distinguished from filler and binder types, is as necessary, or more necessary, for the purpose of assuring the desired color and general appearance than for the purpose of infecting its flavor or aroma. This continous natural internal transformation is completed without the addition, application or use of any external catalyst or other chemical or artificial stimulation or processing, other than to control and regulate temperature. Atmospheric temperature is controlled in the curing barn, and the temperature of the bulks is controlled in the warehouse by taking down and rebuilding the bulks from time to time. Such temperature control is necessary to prevent either an injurious ·acceleration or an injurious stoppage of the natural internal transformation of the leaf, which is nothing more than a gradual and continuous process of drying and oxidation, accompanied by intracellular, activities of micro-organisms and of the internal organic chemicals within the leaf.

The changes in the robacco leaf which occur after the leaf is taken from the barn and put into the warehouse are such as could be allowed to continue, and would continue, if the leaf were left in the cyring barn, if the barn had proper temperature and atmospheric control. But this would be impracticable, first, because there are not enough curing barns on the farm to accommodate or store all the tobacco that would have to be accumulated during the late tobacco that would have to be accumulated during the entire period of time from the first harvesting or priming until the time that the bulk sweating is completed and the tobacco is ready for grading and packing, and, second, because the natural processes which continue through the period of bulk sweating would be too slow and would take too long if the tobacco leaf

When the green leaf is primed and first hung in the curing barn its water content is 80°, to 85°, and the initial states of uning the leaf in the barn consider primarily of a natural and gradual drying of the leaf and the evaporation of the lyrge excess of water, which must be at such a rate and under such conditions as will not injuriously interfere with the accompanying intra-cellular chemi-

were left hanging in the curing barn

the transformations that take place contemporaneously and constitutions throughout the entire curing and bulks weating process. The most covious change which occurs in the leaf while undersome betth curing is (4) the loss of water, which is reduced from 80% to 85%, content to a moisture content of between 10% and 25% and (2) the loss of its green color and a coloring of the leaf, but intespective of the moment when the leaf is temoved from the enring barn into the warehouse it is impossible to say that what memory of time, or that at any particular moment of time, those intracellular changes, which are predominant during the barn-curing period cease and those intra-cellular changes which are predominant during the period of bulk sweating begin. In other words, the intracellular transformation which is predominant during the period of barn curing continues to take place after the leaf is meved into the warehouse and the bulk sweating is begin; likewise, those intra-cellular transformations which are predominant during the warehouse and the bulk sweating is begin; likewise, those intra-cellular transformations which are predominant during

the period of bulk sweating actually have their inequency while the lead is still hanging in the curing barn.

Thus, for instance, the loss of moisture which is more rapidduring the period of barn-curing continues throughout the period of bulk sweating in the warehouse, although at a slower rate. And the coloring of the leaf which commends in the curing barn also continues during the period of bulk sweating, the leaf becoming a deeper green, red or brown. The most notable chemical changes in the constituency of the leaf are a decrease in make acid and airoting content, which is continuous throughout the period of barncuring and the period of bulk sweating; also a rise in the citrie acid content during the period of barn-curing followed, by a reduction of the citric acid content during the period of bulk sweating. The latter change, first in the accumulation and then in the loss of citric acid, is not a sudden change, but gradual, and is believed to be due, not to the fact that the leaf is taken out of the curing barn and put into bulks in the warehouse, but to the effect of other accompanying internal chemical changes and activities of

During the period of bulk sweating the leaf undergoes a most noticeable fermentation caused by the activities of intrascellular intero-organisms. Although most pronounced during the period of bulk sweating, termentation actually begins during the time that the leaf is still hanging in the curing barn. The process of bulk, weating is not for the purpose of causing such fermentation, but for the purpose of controlling and regulating it so as not to injure the leaf or destroy its flavor, aroma, burning qualities

After the bulking process in the warehouse is completed, and before the leaf is graded and packed, the leaf is remeistened,

being sprayed with a fine spray. This remoistering or kasing at a rescalled, is not for the purpose of stimulating or affecting the process of termination, but to keep the lelf soft and pitable enough to withstand necessary handling without breakage or injury. Without such temoistering the leaf would become so dry and brittle that a record not be handled without breakage or injury.

(S.) J. D. VRHEZE

sworn to and subscribed before na this 4 day of August, 1952

(S) William D. Lines, Notary Public

(NP Seal)

My commission expires: April 24, 1954.

AFFIDAVIT OF WALDO S. CARRELL.

STATE OF FLORIDA. County of Gadsden.

Waldo S. Carrell, being first duly sworn, deposes and says that he is a resident of Quincy in Gadsden County, Florida, and is manager of the Quincy Chamber of Commerce.

In the performance of affiant's duties as manager of the Quiney Chamber of Commerce, affiant has had occasion to make surveys of commerce in Quincy and in Gadsden County.

18 The population of Gadsden County; according to the official

U. S. Census of 1950; was 36,457, including the inmates and attendants at the State Hospital in Chattahoochee. The farms population in Gaelsden County for 1951 was 13,400. The population of Quincy according to the U. S. Census of 1950 is 6505.

The reliable estimates, accepted in commercial circles, place the income of the population of the entire county for 1951 at \$25.5 796,000.00. Or this amount \$15,393,000.00 is estimated to be the farm income of Gadsden County.

In Quincy, and within a radius of one mile of the corporate limits, there are approximately 4568 wage earners. Of this number, more than half, or approximately 2415 are employed on farms in tukes co warehouses, and in the business of farm supply, including the sale of fertilizers, agricultural chemicals, facto machinery and implements and seed. Approximately 1460, of the total number employed in Quincy and within one mile of the corporate limits are actually employed on taxes: other the year-round or seasonably. Approximately 2440 of the total number employed in the same area, the year-round or seasonably actually reside on farms. In a recent survey made by affirmt, the proprietors or managers

of 78% of the business establishments in Quency state that their business is dependent directly or indirectly upon agriculture.

In adhast's opinion the town of Quiney is an agricultural com-

WALDO S. CARRELL

19 Sworn to and subscribed before me this 4 day or August, 1952.

William D. Lines Notary Public

N. P Scali

My commission expires April 24, 1954.

In United States District Court

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.—Filed August 29, 1952

Comes now the plaintiff in this cause, Maurice J. Tobin, Seenestary of Labor, United States Department of Labor, through his attorneys and in response to defendant's motion for summary judgment filed heretofore in this cause says that:

I. This Court does not have before it in the present record facts, which would be admissible in evidence and which are presented by one competent to so testify, upon which it can conclude beyond doubt and solely as a matter of law that defendant is entitled to summary judgment in this cause.

20 II Defendant has not presented sufficient facts, which would be admissible in evidence and which are presented by one competent to so testity, for this/Court to rule that defendant has estained the burden of proof it bears of proving beyond doubt but the exemption contained in Section 13(a)(6) is applicable to its employees referred to in the complaint:

III to Decement has not presented, disjoint facts, which would be admissible in evidence and which are presented by one competent to so testily, for this Court to rule that defendant has sussible delpo burden of proof it bears of proving beyond doubt that the exemption contained in Section Establish is applicable to its employees referred to in the complaint.

III Is Defendant has failed to Show such facts, as would be admissible in evidence if presented by one competent to so testify which establish that the basic requirements of Section Blance 10) have been met or that the Administrator's Regulation defining the "area of prichetion" as used in Section 13 and 190) is so tacking support and is so unreasonable as to be arbitrary, capticious and invalid.

IV There are in the present state of the case serious and genume disputes as to many material facts which can only be resolved by/a full and complete trial of the issues.

tag Phintiff asserts that defendant obes not qualify as a farmer within the meaning of Sections 13(a)(6) and 3(f) or

the Act.

21 (b) Plaintiff asserts that the operations performed on the tobacco by defendant at the packing houses are not practices performed by a farmer as an incident to or in conjunction with its farming operations within the meaning of Sections (13) (c) (6) and 3(t) of the Act.

operations are commenced on the tobacco, the tobacco is no longer in its raw or natural state and that therefore the exemption contained in Section 13(a)(10) of the Act is inapplicable to any of defendant's employees who handle or in any other manner work on the tobacco after it has undergone any bulking.

(d) Plaintiff asserts that after the bulking or fermentation processing activities have commenced the tobacco is no longer an "agricultural commodity" within the meaning of Section 13 (a) (10) of the Act.

Wherefore, plaintiff prays, this Court for an order denying defendant's motion, for 'summary' judgment,

Dated this 28th day of August, 1952.

(S.) William S. Tyson,
Solicitor,
(S.) Beverley R. Worrell,
Regional Attorney,
ROBERTSON H. HESSE,
Attorney,
United States Department of Labor,
Attorneys for Plaintiff,

APPROXIT OF WILLIAM H. OLSON, JR.,

STATE OF FLORIDA.

County, of Pinellas, sa:

WILLIAM H. OLSON, Jr., being first duly sworn, says

That he is, and since February, 1941, has been, an investigator with the Wage and Hour and Public Contracts Divisions, United States Department of Labor, and since May, 1947, has been assigned to the investigation staff of the Regional Director for Region IV, said regional office of the aforesaid Divisions, having within its jurisdiction the state of Florida. That on December 13, 1951, acting within his official capacity as investigator, he made an investigation of King Lilward Tobacco Company of Florida, detendant of this cause, at which time he examined the defendant's records pertaining to the epcration of its business, interviewed and conferred with various officials of defendant and interviewed various employees of defendant, and that from the materials he examined during this investigation, and from the above sources, in his acquired personal knowledge that as of the time of his investigation:

Deithdant is an affiliate of Jao. H. Swisher & Sept. Inc., and was incorporated under the laws of the state of Florida in Moteb. 1949. As of January 7, 1952, defendant's corporate officers were:

23 Carl. S. Wisher President B. Ottinger Vice-President

Jack Vrieze-Vice-President.

. C. J. Gunte-Treasurer.

V. C. Davidson-Secretary.

B. (Bat) Ottinger, Vice-President of defendant, is an official of Associated Tobacco Growers & Processors Co., another affiliate of Jac. H. Swisher & Son. Inc., Juo. H. Swisher & Son. Inc., buys over 50 per cent of the yearly crop bandle i by the defendant and its affiliate.

Defendant corporation owns none of the farm lands, terroit houses, warehouses or the land beneath the warehouses (having a value in excess of one millions (\$1,000,000,00) dollars) all of which are owned by Jno. H. Swisher & Son, Inc., and leased to its affiliate, the defendant, on an annual rental basis totaling for the year ending August 31: 1951, the sum of one hundred thousand (\$100,000,00) dollars. The only assets usually associated with a "farmer" which defendant corporation owns consist of certain furniture, automobiles, trucks; tractors, combines, work animals, irrigation systems and other such personalty.

Defendant operates three packing houses in and around Quiney. Florida, which it does not own but rents from Jno. H. Swisher & Son, Inc. Pertaining to the 1951 erop year, defendant bulked or awasted" at these three warehouses a total of approximately 595,901 pounds of Type 62 bade-grown tobacco. Of this 595,901 pounds of said tobacco bulked by the defendant at the warehouses it had rented a total of approximately 354,967.

21 Dands had not been grown by delection but, had been purchased by defendant from other persons who had sown it, while only approximately 240,498 pounds, or about 10 per cent, of the total bulked by defendant in its rented warehouses was grown by defendant itself on the farms not owned by it but rented from Jno. H. Swisher & Son, Inc.

For the fiscal year ending August, 1951, and pertaining to the 1950 tobacce crop, the cost to defendant for the tobacco it purhased from others who had grown such tobacco and which it bulked in its rented warphouses was \$714.262.39; whereas the farm cost to defendant for growing tobacco on its rented farms was only \$482.709.80. During this period, and for this grop, the packing, (bulking) cost was \$215.463.47 plus an "administrative, cost" of \$62.643.06. The total cost to defendant for its operations on the 1950 crop of Type 62 shade-grown tobacco amounted to \$1.505.078.72 of which amount only \$482.709.80 or approximately 32 per cent was attributed by defendant to form cost.

While there is common overall management of both farming and bulking operations through Mr. Jack Vnieze, each farm and each packing house is under the direct supervision of one superintendent who is responsible for the operation of his unit. Each superintendent has full authority to hire, fire and control the employees in his unit and each pays the employees under his constrol by means of checks transmitted to him from the main office.

Defendant has completely segregated all payroll and production records according to farm or packing house. Each 25 farm and each packing house has its own separate and complete payroll and production records which are maintained by defendant's employees in its main office from primary records kept and turned in by the various superintendents. Production costs are maintained on a unit basis. There is an entirely different wage scale for both supervisory and non-supervisory employees as be-

(S.) WILLIAM H. OLSON, JR.

Sworn to and subscribed before me this 23rd day of August. 1952.

(S.) KINGLAND SMITH.

(Seal)

My Commission expires; 3-25-55.

AFFIDAVIT OF ROBERTSON C. HESSE

State of Alabama, ... County of Jefferson, ss:

ROBERTSON C. HESSE, being first duly sworn, says;

That he is one of the attorneys for the plaintiff in this carse, that he does hereby certify that the attached Exhibit "A" is a true and accurate copy of the biographical description of Wightman Wells Garner as it appears in Volume 25 of Who's Who in

Anterier page \$7, and that he has compared Exhibit A. with the original and finds it to be a type and regulate copy thereof

He mather certifies that the attached Exhibit Be combustrue and accurate transcriptions from the book by said Weightman Wells Garner extitled. The Production of Tolaicro, and that the has personally compared said transcriptions with the original statements appraring an that book and lines them to be true and accurate

" ROBERTSON CARREST

Sworn to and subscribed before me this 28th days of bugest

(S.) Bernice L. Carpenter. Notara Public.

(Seal)

My commission expires: 1-11-53.

EXPURIT "A", TO AFFIDAVIT OF ROBERTSON C. HESSE

(Garner, Wrightman Wells,) chemist, plant physiologist b. Timmonsville, S. C., July 15, 1875; s. James Nathaniel and so-anna (Wright) G; S.C. Mil. Acad., 1892-93; A.B., U. of S.C., 1896; Ph.D. Johns Hopkins, 1900; Sc.D., Clemson Coll., and N. C. State Coll., 1937; M. Judith Goode, Nov. S. 1905, Instructional Coll., and pvt. asst. to Prot. A. Michael, Tufts Coll. Mass., 1900-03; scientific asst. Bur. chemistry, Dept. Agr., 1904; scientific asst. in tobacco investigations, 1905-08; physiologist in charge, tobacco and plant nutrition investigations, 1909-40, principal

physiol. in charge, tobacco investigations, Bureau of Plant 1 Industry, Dept. of Agriculture, 1941-45; retired. Fellow AAAS; member American Chemical Secrety, Am. Gerictic Assa, Bot. Soc. America, Am. Soc. Naturalists, Washington Academy Sciences, Am. Soc. Plant Physiologists (Stephen Hotes Award 1930). Am. Soc. Agronomy, Sigma Alpha Epsilon, Phi Beta Kappa. Episcopalian. Author scientific papers in American and foreign jours, and bulls, particularly on photoperiodism in plants, mineral nutrition of plants and tobacco production. The production of Tobacco", in 1946. Home: 1367 Parkwood Pl., Washington 10, D. C.

EXHIBIT B TO AFFIDAVIT OF ROBERTSON C HESSE Pages 311-319

Chemical Constituents of Tobacco

The morphology, structure, and chemical composition of the leaf may be said to determine the properties of the leaf and all.

have important bearing on its quality. Qualitatively, tobacco feat perhaps does not differ greatly from the lear of other comparable plants except for its content of meeting and closely related alkaloids. Quantitatively, the various commercial types of leaf tobacco differ widely among themselves in composition and there are important variations even in different graps of the same type. We are here chiefly concerned with qualitative aspects of composition, and quantitative relations are considered more fully in Chapter Twenty-one.

Carbohydrates. The various forms of carbohydrate found in the mature leaf, considered collectively, constitute from 25. to 50 per cent of the total dry matter (Pyriki, 1934), Theproportions of the several forms varies widely in the different types of tobacco but, in general, total carbohydrate is tively high in eigarette tobaccos and low in the eigat type, * The three major groups of earbohydrates to be considered are; (1) the reserve carbohydrates which enter more directly into the nutrition and metabolic processes of the cell protoplasm and reduce starch, dextrin, maltose, cane sugar, glucose, and fructose; (2) the hemicelluloses which enter largely into the make up, of the cell wall but, because of their capacity to yield sugars by mild; hydrolysis, may also function to some extent in cell nutrition, the two chief groups being pectins and pentosans, (3 athe highly condensed stable forms, cellulose and lignin, which, together with the hemicelluloses, furnish the framework of the leaf but ordinarily. play no part in mitrition.

Althoughed the case of the tobacco leaf not all of the individual, members of the reserve carbohydrate group mentioned above have been actually is clated and identified, there seems to be no reason for doubting that all of them are present at one time or another, as products of as important dissimilation. Application of the usual methods for simulative determination of the several carbohydrate fractions indicates that this is the case. Starch and invert sugar, however, are the most important components of the

reserve group of earbohydrates.

Pectin occurs in the leaf in considerable quantity and the pectic acid isolated from it seems to have about the same composition as the pectic acid from flax. When broken down it yields methyl alcohol, acetic acid, galacturonic acid, and pentose sugar 29 (Neuberg and Scheur, 1931). Tobacco pectin is soluble only in small part in cold water. In addition to pectin, the tobacco leaf also contains small quantities of pentosan but little is known as to its exact composition. Cellulose as a pagior constituent of the cell wall occurs in important quantities in all parts of the leaf but is especially abundant in the midrib and lateral vens. In the ordinary routine analyses it constitutes the fraction designated as crude fiber, though this fraction usually is not pare

cellulose. In the case of the tobacco leaf apparently no study has been made of the process of lignification whereby in the later stages of development the cell wall is hardened by the formation of the substance known as light, which differs materially from both peetin and cellulose. Since lignification is largely confined to the viscular system, however, it is to be expected that the content of light in the leaf lamina would be relatively low. The woody portion of the stalk, on the other hand undoubtedly has a high content of figure.

Nitrogenous Compounds. There is wide variation in both the total nitrogen and its distribution between the various forms in which it is found in tobacco. In the green leaf by far the largest component, is the protein fraction while, in most cases, nicolone. nitrogen ranks second in importance, especially no the later stages of leaf development. In the cured leaf the decomposition prednees of protein mercase and max even exceed the residual protein content. Very little has been done in the isolation and identification of specific proteins in tobacco; An interesting exception is the tobacco-mosaic virus protein, which has been isolated in crystalline form and extensively studied. Little is known, as to the identity of the peptides and free amino acids but asparagine and ghitamine have been found to occur in the leaf and these possibly are the only amides present, according to Vickery and associates (1937). In tobacco seed a gobulin type of protein has been isolated in crystalline form and the soluble derivatives of protein, choline, betaine, adenine, guanine, affantom, and arguing also have been identified by Vickery and associates, (1932).

Nicotine, having the Journala C10H14N2, is the most characteristic chemical constituent of tobacco, though it has been recently reported that in strains of Maryland tobacco and certain other varieties having a low total alkaloid content nicotine is replaced as the chief alkaloid by the closely related nornicotine C9H12N2. Nicotine was first isolated from tobacco, and its properties described in 1828. Except from a botanical viewpoint, it may be considered that a leaf devoid of nicotine or, possibly, its near relative, nornicotine, is no longer to be regarded as tobacco. 'A number of secondary alkaloids in addition to nornicotine have been reported as occurring in tobacco but, when present at all, these occur only in minute quantity. The distribution of nicotine in the plant organs at different stages of growth has been studied by Chuard, and Mellet (1912) . While nicotine is usually the dominant alkalofd in bold ordinary tobacco (Nicotiana tabacum) and N. rusticae in a large proportion of the wild species of Nicotiana normisotine is dominant. Nicotine is often present as a secondary alkaloid while, in a few of the wild species including N. glauca Grah a third related alkaloid known as anabasine, C10H14N2,

is the chief alkaloid (South and South, 1942). Nicotine has not been found in solanaceous plants outside of the genus. Na otiana But has been reported to occur in traces in Asclepias syriaca, a member of the Asclepiadaceae family

Nicotine, in the pure state, is a colorless, rather mobile, oily hound which soon darkens upon standing. It is slightly heavier Than water, with which it mixes in all proportions at ordinary temperatures and it is soluble in most ordinary organic solvent Nicotine boils at about 247 C. At cool temperature it has lattle? odor but when elightly warsed its vapors become quite irritat-It is easily a blatized with steam 3. It is strongly alkaline and forms with acids monacid salts which are neutral and diacid salts having an acid reaction. Nicotine is chemically related to pyridine and, when oxidized, yields nicotinic acid which is 2-pyridinecarboxylic acid. It is, in facts a condensation product of pyridine and n-methyl pyrrelidine. It forms a precipitate with tannic acidand a very insoluble compound with silicotungstic acid. With pierie acid it vields a difficultly soluble, enestalline dipierate. Masture tobacco seeds contain no nicotine but it promptly appears following germination and thereafter is present in all parts of the plant, including the seed in its early stages of ripening. It is most abundant in the leaf, although apparently it is synthesized in the root (Dawson, 1942)

As would be expected, ammonia is present in the green leaf in. only a very small quantity but markedly increases in the processes of curing and fermentation. The presence of parrate in the growing erop and the cured leaf depends primarily on the conditions of nutrition. With a sharply limited hitgogen sup-32 ply in the soil, the nitrate content of the crop will be very

low, but with an excess nitrogen supply the plant is capublic of storing considerable quantities of nitrate. In the leaf the nitrate is found chiefly in the midrib and veins.

Organic Acids. These acids, especially nonvolatile polybasic acids constitute an important fraction in the composition of the leaf though not all of those normally present have been identified. The metabolism of the organic acids of the tobacco less during growth has been investigated by Pucher, Wakeman and Vickery (1937). The content of malic, citric, and exalic acids, in tobacco has been rather extensively studied and usually make acid is the most abundant of these. Oxalic acid is normally presout as the calcium salt, and malie and citric acids also are largely combined with calcium, magnesium, and potassium. I marie, succinic, acetic, and formic acids also deene in the leaf. The complex aromatic compound, chlorogenic acid, and its two component, ounce and caffeic acids, likewise have been reported to be present. Throughout the period of growth and development the leaf shows an acid reaction, as measured by hydrogen-ion concentration, the pH value ranging from above 5.0 to 6.5, depending on conditions of nutrition and maturity. The cared and fermented product also has an acut reaction.

Polyphenols. Schunisck (1930) has studied the famin-like Sibstances designated as polyphenols, which occur in important quantities in the leaf. These substances not only affect the color and other properties of the circul product but are believed by some to play an essential role in the oxidation-reduction processes of the cowing play incident to respiration, and in the sub-

seglient caring and fermentation processes. The wellknown substances mosited a sugar-like-hydro-benzol, and the prayrously mentioned quine held, which appear to constitute. links in the formation of polyphenois from sugar, have been isolated from tobacco by Schmuck e1930). With the exception of elilorogenic acid, little is known about the identity of the polyphenols or tannins of tobacco. In general, they are present as colorless constituents of the living cells of the plant, and are frequently designated as chromogens. In the dying or dead cells , they produce red or brown colors by undergoing excessive oxidation because they are hydrolyzed by ferments no longer subject to orderly control and are freely exposed to the exposen of the air-These polyphends are commonly present in the living cell in the form of glycheides which split off sugar when hydrolyzeth. Unfortunately, accurate methods are not available as yet for quanthative determination at the polyphinols

Chlorophyll and Other Pigments. In the growing plant the green thlorophyll pigments are of outstanding importance and with certain exceptions, as in the case of the White Burley variety, they more or less completely mask all other pigments present. Always accompanying the two green pigments, chlorophyll a and chlorophyll b, are the two yellow pigments, carotene and xanthophyll, frequently spoken of as carotinoids. The yellow pigments come clearly into evidence only as the green chlorophylls begin to disappear, as in the ripening of the leaf and especially in the carly stages of caring. The yellow pigments, however, definitely contribute to the brillance of the original green color of the leaf. The intensity, and brillance of the green in the fresh leaf depend.

largely on the variety of the tobacco, the conditions of nutri-31 tion, and the De or maturity of the leaf. It has been gound by Nagel (1939) that differences in the ratios of chlorophyll a and chlorophyll b, or carotene to xanthophyll and of the sam of the green pigments to the sum of the yellow pigments may be involved. In addition to carotene and xanthophyll, the pigment of the flavone group, known as rutin, according to Hasegawa (1931), and possibly still other pigments also contribute to the pure yellow color that normally develops in the first stage of curing, as the green chlorophyll is destroyed through process, of exidation.

The rechish or brown coloration which commonly develops in the second stage of the curing except in typical flucturing, we even in the field is caused by oxidation of the above mentioned polyphenols and other glycosides, including ruting by appears that by gradual oxidationally last named compound develops, successively, a vellow, red, and brown color, the seat of action being in the epidermal cells of the leaf rather than in the mesophyll.

Ethered Oils and Resins. These products embrace two highly important but complex and little understood groups of constituents which apparenty minish the true aromatic principles of robacco. The ethereal oils and the resins occur in the glandwas haits of the leaf, and the sticky gum which collects on the hands of workmen handling the green leaves is composed chiefly of fragments of the lifes and their gentent of the otherest oils, resins, and plant way. By steam distribution of green or cured tobacco leaves or extracts obtained from them with organic solvents investigators have repeatedly obtained small quantities of

35 ethereal of These have been more or hes complex mix
by tures, apparently containing hydrocarbons of the termine

group, phenois and esters of unknown composition. Apparently
the essential of of tobacco flowers are similar to those of the
toliage leaves.

Similarly, by extraction, with alcohol, saponification, and precipitation with acids and bases, the resin component has been variously fractionated into complex groups of resin acids, esters, alcohols or resinels, and the indifferent resenes, but in no ease have the individual members of these Groups been isolated and identifiel. The resins are believed to be formed from the ethereal oils. with which they are closely associated, by processes of oxidation and condensation. The resins are soluble in alcohol. The resene fraction forms a partly solid, sticky mass of yellow to reddish-brown color and possesses an agreeable honeylike aroma The resin-agid complex has been separated into three tractions, which have been designated as, alpha, beta, and gamma tebaccie solds but none of these appears to possess a characteristic aroma. Accompanying the ethereal oils and resins are certain saturated paraffinlike hydrocarbons, sometimes designated as tobecco way, which are soluble no hot alcohol but insoluble in cold alcohol. This soft wax, which is present in the leaf to the extent of 0.5 to 1.0 per cent, is composed essentially of the hydrocarbons heptocosane, C27H56, and bentviacostane, C31H64, in approximately equal proportions, and has a meltine point of the C. This prodnet develops no aromatic properties, when heared and appears ra tobacco smoke as air colloids (Pyriki, 1942, b).

Enzymes. Present knowledge of the many enzymes or ferments which govern metabolism in the tobacco plant

36

throughout its growth and development and in the subsequent curing and termentation of the leaf is father immed. This X especially true, perhaps, with respect to nitroson metabolism, Experimental evidence has been presented, lowever to show the presence in the cured lear even when the these curing enchool has been applied or protease hipases emals in any lase, invertisely these phases, giveolase, pectase, ketone-aldehyde mutase, exidase, petexidase, catalase, and reductase.

Mineral Constituents. As compared with most other crossplants, tobacco has a high content of ash, that of the leaf usually ranging from 12 to 25/per cent. The quaintity and the composition of the mineral component are of importance not only bescarse of their influence on growth and development of the plant but also because of their decided effect on the combistibility and other elements of quality in the leaf. The content of ash in the mature leaf is much higher than that of the stem and root the ratio of distribution between the three parts approximating 12.7.5. Under favorable conditions the plant may also be the essential elements in much larger quantities than are required for normal growth and also may also be appreciable quantities of elements which are not essential for normal growth and developments. The latter elements may be beneficial, innocencies or they may be definedly toxic. The comparative content of the principal mineral constituents of the leaf is illustrated by the data of Bailey and Anderson for Connecticut circus binder tobacco (1928)

The number of elements recognized as being essential for normal growth of telegers has been considerably increased as a result of recent research, and it may well be that eventually still others will be found to be required in extremely small quantities (McMurttey and Robinson, 1938). The essential material elements may be conveniently divided futo two groups, namely, those required in relatively large quantities, and therefore stoken of as macro nutrient and a cound series conmonly spoken of as micro nutrient clements because they are needed only in outlines quantities. The members of the first errors which have long been recognized as being indispensable to the plant, are calcium, magnesium, phosphorus, potassium, and sulfur. Other elements commonly found in the ash in considerable quantity but an end chlorine

Calerum is the leading constituent of the ash in point of quantity, exert that potassium frequently assumes that position when there is a liberal supply in the growing medium. These two elements that titute 50 per tent or more of the ash. Magnesium, phosphorus, and sulfur are present in much smaller proportions and of these, the content of phosphorus is usually clovest.

At the present time, the group of unbro nutrient elements actually demonstrated to be essential for the tobacco plant consists of boron,

iron, manganese, zinc, and copper. In contrast with the group of macro elements, the micro elements may become highly toxic to the plant when present in the culture medium in soluble form even in relatively low concentrations. Consequently, the content 38 of these elements in the crop is absolve very low. This is especially true with respect to horbin, zinc, and copper. Aluminum, which is normally present in the leaf to the extent of less than C.I. per cent of the dry weight, is not regarded as being essential. Among other elements which have been shown to occur in tobacco in very small quantity but not regarded as essential are barium, lithium, and iodine. Assenic has been found in significant quantities in some manufactured tobacco but this has been regarded as due primarily to applications of arsenicals to the grop in the field for insecticidal purposes.

Page 327

On the other hand, thorough curing and fermentation tends to darken the leaf but, at the same time, materially reduces its constent of nicotine. Color in tobacco is dependent on many factors, but soil texture, nutrition conditions during growth, the maturity of the leaf, and the rate and conditions of curing are especially important.

Page 328

Tasta

The tobacco leaf, after curing has a raw, acrid, bitter taste. After fermentation or aging the taste is much less harsh but the bitterness remains, at least in part. There is a wide variation in the degree of bitterness but the factors involved are not definitely known. In the case of some cigar tobaccos, droplets of a black, intensely bitter fluid may be formed on the end of the eight which is held in the mouth in smoking. Tobacco contains appreciable quantities of glycosides and, since these substances commonly have a decidedly bitter taste, it is possible that they are responsible for the bitterness of the leaf.

Pages 414-420

Fermentation or Sweating of Tobacco

Before the freshly cured leaf is fit for human use it must undergo a fermentation or aging. There are no exceptions to this rule. This is the feature of tobacco production that is most conationly overlooked by amateurs who undertake to grow tobacco for home use. Tobacco is improved in many ways by this processing but the outstanding effects are development of the desired odor and around and elimination of the rawness or harshness and in part the bitter

taste which characterize all ireshly cured leaf. The color of the lear usually is improved, the general tendency being toward an ; evalues of shade, disappearance of green shades, general darkening of the color, and, in some degree, dulling of laster. The gifts of the leat partially loses its sticky properties. Usually the combustibility of the tobacco is improved. Depending on the extent of the fermentation the elasticity may be aedired and in extremecases the leaf tissues may be greatly weakened. If the refrmentation is too sever or unduly prolonged, the unprovements in arona, color, and some other elements of any initially obtained may be largely ... lost. It is grove important, therefore, that the fermentation be properly controlled and the requirements view greatly with the viifferent types of leat. Fermentation in tobacco is often spoken of as 'sweeting,' probably because of the tendency of the tobacco to become bested and to give off moisture in the

process. Used in the broadest sense the term rementation in hale aging which seentrally is but a relatively very slow term of termentation. There can be no hard and fast distinction between fermentation as referring to a more or less rapid, vigorous action, with considerable evolution of heat and the slow process of aging, for these are all degrees of termentation and probably

different types of dermentation are at times involved.

Typical tobacco termentation is but the resumption of reactions taking place in the later stages of curing in the barn that have been temporarily Quepended by the drying out of the leaf By use of Fir conditioning on a large scale it has been demonstrated that excellent results in termentation immediately following the caring can be obtained without in any way disturbing the tabaeco as it water in the cuting barn. The outstanding factor controlling the character rate and extent of the ferreintation is the moisture content of the leaf. Take the earing, the rate of fermentation also depends on the temperature. Accordingly, although with sufficient lowstone tobacco will feminis while begins in the harn the late will be very slow unless the temperature of the air is raised. Normal fermentation is a process of exidation and an adestrate supply of ar a remired but in its absence a modified anaerobic type of activity will take place. Finally, the capacity of the tobacco to fervolved, the conditions under which it was produced, and the amount , of the tobacco mass, its degree of compactness, and other

The inoisture content of tobacco at the beginning of the firm nutation or aging process is extremely variable and for the first part is not accurately controlled except in the domestic eigatette types and other types as exported to the United Kingdom. Where the moisture content is excessive, serious losses frequently:

result from decay of the leaf by microorga isms, this decay, being known as black rot. In ergar bebaccos the initial content of moisture usually varies from 20 to 30 per cent or more while a content of about 25 per cent is required for best results. In he heavy fermentation of low-grade eight leaf to be used for elewing purposes, however, the centent of moisture may be as high a 40 per cent. The dark air-cured and fire-cured types except when intended for export to the United Kingdom are packed for fermediation with moisture contents ranging from 14 to 22 per cent. Turley and flue-cured leaf for domestic incumsacture are package for aging with an average content of moisture of about 10 to 13 per cent. Flue-cured and other types destined for the United Kingdom are packed with about 11 per cent moisture, because of the heavy import duties on tobacco and the additional duty that is imposed if the moisture content falls below 10 per cent.

In preparation for fermentation or aging, tobacco usually pressed into standard containers or form planely, boxes or "cases, hogsheads, and bales or it is placed in large piles or balks in a warehouse having facilities for at least partial control of temperature and humidity. In the open bulks the condition of the tobacco is more easily followed than in the closed containers so that some-

what higher moisture contents can be safely used. Active fermentation is a strongly exotherific process and unless the 42 heat is dissipated as rapidly as formed, the temperature of the tobacco rises and the fermentation process becomes self-ac-Naturally, this temperature rise is most aconomical in the large masses or bulks of tobacco since these more effectively. retain the heat as released. Himmke (1908) has studied technicature relations in tobacco bulks as affected by grous factors. Its adequately in thated, as in Dewar flasks very small masses of the bacco show the characteristic rip in temperature. A matter of great practical importance is the fact that when packed in cases or in hogsheads in quantities of 500 to 1000 pounds or more and stored in warehouses, tobacco remakis practically dormant as long as the air temperature continues below approximately 60° ,F. whereas active temperature often with decided rise in temperature in the tobacco, develops at higher room temperatures. This is the explanation of the well-known spring sweat which begins with the seasonal rise in air temperature. That fermentation is hardly a process of slow combustion is indicated by the evolution of carbon dioxide and the absorption of oxygen. When tobacco is fermented in the absence of oxygen, as in a sealed container, much ammonia is formed, and the product Rule to develop or to petrin a normal ... aroma

The high-natrogen, low-carbonydrate types of tobacco, especially, the cigar tobaccos, normally develop the most rapid, active, and

deep-scated sort of fermentation. The cured tobacco, on the other hard, only passes through a very slow, long-continued peoples of aging and the process is seasonal, depending on natural change in temperature of the air [25] given type of eight tobacco.

however shows decided differences in teachness with which it ferments, depending on the condition of production. In ceneral, a crop produced in a set season fermions very readily and rapidly, with sharp rise in temperature, whereas a dry weather crop usually is much less active, showing little tendency to develop the morgial rise in temperature. The upper less mature leaves of the plant ferment more vicorously than the fully mature lower leaves. Large masses of tobacco develop a rise in temperature more rapidly than smaller ones and the fermentative activity also may be increased by increasing the compactness of the mass within certain, limits.

Bull: Swerting

The bulk method is applied generally to cigar tobaccos in fereign econtries. A large portion of the domestic cigar binder lear crop is given a preliminary region attom in bulks before packing for the case sweat.

All shade-grown cigar winopers the Florida sun-grown cigar filler and Florida binder sent fire-circal leaf for Italian character and most of the filler leaf for the short-filler eigers the statume erades of leaf for cran chewing, and some small tobaccos are fermented by the bulk method, The methods used vary with the type and grade of leaf. They range from the very careful and precise methods required in handling the delicate and high-valued shade wrappers to those faster methods employed with the cheaper tobacco, where large quantities are builded quickly and tearing or breakage is not so important (Fig. 71). Most of the circum

stemming leaf-usually undergoes an initial bulk sweat in the bundle or bale where many thousands of pounds may be piled together. After this initial sweat while lasts 6 to 12 months or longer, the piles are broken, the bundles are opened, the leaf is sprayed for dipped in water to restore the moisture content to the optimizan amount. The tobacco is then repiled either in a tangler mass or shingled layers and there follows an immediate temperature rise indicative of active fermentation.

In nearly all cases, however, neither the bulk method nor the case sweat as initially carried out is sufficient to prepare eigar tobacco for manufacture. After the final packing in cases, bales or other packages, the lear commonly undergoes further aging.

For one or two years or longer and prior to use, domestic cigar

filler is subjected to vigorous resweating after adding monoton run. This process was investigated by Krayball (1916)

The bulks of tobacco are rectangular marine usually lowers width of 6 it; a length of 10 to 12 it of thore, and a height of 5 to 7 it. Such bulks contain 1000 to 6,000 points of tobacco become a moisture content of 21 to 30 per cent of more. In Sumatra & cigar-wrapper bulks may be made far breer, especially in rebuild. ing for the later stage of fermentation. The bulk is one trucks. sense marched-board platform guisid about 4 m. above the flore which may be covered with paper or loose leaf tobacco. The bulk I've begun by laying the outer one or two rows, with the butts of the hands always pointing outward. Fact spreading rays, 45. laid shingle tashion, with the hands over lapping about half? those of the preceding row till the first layer or courses i completed. Each succeeding layer is completed in the same way. always beginning on the outside. One or more metal pines may be laid on the bulk when half completed at that thermonisters can be inserted for the purpose of following the temperature changes. The bulks are covered with canvas or rubber blankers to check the drying out of the tobacco. The temperature of the room is usually kent at 70. 80. F. or somewhat higher and the relative humidity, bould not be lower than 70 per cent. Under these conditions the emperature of the bulk should reset o 120. I in five to seven days.

A temperature of about 120° F is in most cases considered the prover maximum for eight wrapper, and when this is reached the bulk is torn down and rebuilt. Cigar filler may be allowed to reach a temperature of 140° F, or even 150° F. The bulk is reconstructed in the same maximum as in the first stance but the hands are redistributed so as to bring the other hands of the odd bulk near the center of the action becomes more uniform fermentation. Because of heat loves from the center bookings the temperature is not the same in all marts of the bulk the halos temperatures occurring in the central arcs. Temperature distribution through the various portions of the bulk has been studied in detail by Vriens (1912). After each rebuilding of the bulk temperature rises more slowly and fails to aftern the previous maximum unless additional water has been added. Usually three

to five turnings of the bulk are required to complete the fermentation.

In addition to the generation of hear active tobacco fermentation is characterized by rather rapid evolution of carbon dioxide, with a corresponding absorption of oxygen from the air. Ordinarily the ratio of carbon dioxide to oxygen tends to become unity but since the tobacco is rather compact the accumulation of carbon dioxide within the bulk may become quite high. Under

certain conditions the fermentation may become analyobic in ty-Under these conditions the earlier dioxide linguist has exhabit the oxygen absorbed. Begause of the marked difference in the from temperature and that of the interior of the bulk a limited amount of air circulation may be expected. Apparently the specific gravity or the carbon dioxide formed also is a factor in paternal cas moves gas so that the highest concentration asmally occurs in the lower , portion of the bulk. The distribution of extien dioxide in the tobacco bulk has been studied by Jensen (1908). While the evolution of heat is closely associated with the carbon dioxide formation there is an appreciable lag between the rise in carbon dioxide fermation, and the corresponding rise in temperature because of heat absorption by the tobacco. It is a striking feature of tobacco fermentation especially where small masses are involved that the formation of carbon dioxide is very rapid during the first 12 to 21 hours, after which there is a decreed decline in take to a comparatively low level which may be maintained for a prolonged i orfoid.

The extensive formation of carbon dioxide, with evolution of heat, righles loss in the organic portion of the divergence-

Dosing the leat. Only very limited data are available as to the amount of this loss which in any case is variable, de-

. · pessing on the type of tobacco and the vigor and duration of the fermentation. Cigar wrapper, which is given a comparatively: mild sweat, apparently undergoes a loss in dry matter of the order of 5 per cent. With the heavier sweat usually given cientfiller tobacco the loss in dry matter may reach 10 or 12 per cent or more. The slow aging of cicar tobacce which frequently fellows the active fermentation will entail an additional small loss while resweating after addition of water to the tobacco will result in important additional losses. There is also a notable loss of moisture in the fermentation which often exceeds the less in dry matter. This loss is probably due chiefly to the increased yapor pressure resulting from temperature rise and to the fact that the fermentation renders the leaf less hygroscopie. No comprehensive studies of the chemical changes occurring in the fermentation have been reported but in the eigar tobaccos, which are high nitrogen types prope to undergo very active fermentation, it appears that the nitrogenous constituents as a whole are most active. Some of the changes taking blace in active fermentation have been reported by Behrens (1894). Protein nitrogen undergoes but little change. except in heavy sweating and in rather drastic resweating but there is a decided decrease in amino altriven and an increase in ammonia. There is an important, loss of nicotine, commonly ranging from 15 to 25 per centsor more of the total originally present.

It appears that narrates may be formed sharing the fermentation. Cigar tobacces usually contain very high starch or success if any, at the end of the curing process but when process the set and make he is are subject to substantial losses. In the milder type of fermentation cellulose and other cell will component undergo little change. In view of the general tendency, toward development of darker colors it seems likely that the polyphenology undergo exidation to a greater or loss degree. It has been observed that the physical constants of the ethereal oils are modified in the course of the fermentation and some investigators have observed decreases in the content of tobacco resins.

Pages 426-429

Cause of Tobacco Fermentation

Although the effects of moisture, temperature, and other environmental factors on fermentation and the nature of the chemical changes taking place have received considerable attention by investigators, chief interest has always centered or the causal agency or agencies concerned in initiating and controlling the chemical processes. One school of thought has been that only the processes of exidation which do not require the intervention of catalysts are involved; a second theory supposes that from contained in the tobacco functions as a catalyst; according 65 a third group of workers the fermentation is due to the activities of increasing including both bacteria, and functioned according to a fourth theory the fermentation is produced by the action of the intra cellular, in zymes of the leaf. For nearly 50 years there has been a societal controversy between the adherents of the two last-named theories

and a fairly extensive literature has developed on the sub49 ject. The microbial theory was at one time extended to
include the concept that by appropriate transfer of specific
microorganisms the fine aroma characteristic of one type of tobacco could be developed in other inferior types. This conception
was advanced by Suchsland (1891).

That metabolism in the living leaf is controlled primarily by a host of specialized enzymes contained within the cells is not open to question, and it has been demonstrated that many of these enzymes are not permanently mactivated by the drying of the leaf tissues in the course of the curing. It is to be expected, therefore that these enzymes will renew their activities, at least his part, where sufficient moisture is added to the leaf provided the appropriate substrate materials are present. The enzymatic theory of tobacco fermentation was first advanced by Loew (1899, 1901). To the extent that these enzymatic processes actually contribute to

the jermentation of is vident that it movely constitutes a continuation of transformations takene place in the civing and temperative interrupted by the drying set of the leaf. On the other hand, many species of nicroorganisms are to be found on cured to bacco and wish a sufficient supply of ministure and other conditions favorable the Cornantisms may be expected to become active. The innereflera of fermenting tobacco has been investigated anew in fermi years by Johnson (1931) and by Reid, McKinstry, and thiny (1933). The important question is whether or not the presence of microorganisms is essential to normal termentation, that is, whether any chemical change, brought about by them are incidental rather than essential.

Effort to study permentation under sterile conditions have usually given conflicting or indecisive to the Begaise of the difficulties in stirilizing tobacco without injury to the intracellular enzymis. This appears to have been accomplished in certain cases. bowever, and the tobacco was found to retain without material inpairment the capacity to produce earbon dioxide, with accompanying pyrogenesis and oxygen absorption, development of aroma and other characteristics of termentation. In studies on the aging of flue-cured tobaccos with a moisture content as low as 10 per center. Dixon and associates (1936) found no evidence of significant growth of micreborganisms. According to Smirnov (1927, a. 1927, br. susceptibility to attack by Dingi and bacteria in tobacco, as in other media, depends primarily on the relative humidity of the surrounds ing air rather than the moisture content of the substrate. In the case of tobacco the reason for this is that the leaf varies in its content of constituents having antiseptic properties; such as the polyphenols. These constituents lose their antiseptic properties however, when highly diluted, and may become good sources of carbon for molds. It was found that the optimum relative humidity for chevinatic activity without intervention of molds is 70 to 75 per cent and 80 per cent as excessive. If the conclusions relative to antiseptic effects of polyphenols, which are based largely on observations with the Oriental types or tobacco, have general application they would largely explain the increased resistance of eigar tobaccos, with their ligh content of polyphenols, to attack by microorganisms.

It is claimed by Smirnov that the lower lines of relative humidity of the air twith the moisture content of the tobacco in 51. equilibrium therewith which will permit development and growth of molds is approximately 85 per cent. It appears that the corresponding limit for growth of bacteria on tobacco is definitely higher—about 96 per cent. These conclusions as applied to Oriental tobaccos are based both on laboratory experiments and on observations in commercial warehouses. In the warehouses.

the rise in temperature of the tobacco was in no manner related to development of molify. Development of good quality in the fermentation was always associated with absence of molds and a Remeted colative is underly. Wold development was invariably ascoring of wall poor quality and excessive air humidaly. The moistage content of tobacco in equilibrium with given relative humidities Aven temperatures is subject to considerable variation, depend-2 of the type and grade of tobacco and the conditions under which produced. The moisture content of whie-edings tobacco in equilibration with a reflective luminelity of 70 percent at round employature approximates IS per cent and at a relative humality of 80 pper cent may be as high as 25 per cent. It is well known that the curred lear would spoil under these conditions. Under similar conditions the moisture content of eight tobacco probably would range from about 14 to 20 per cent, whi would not be at all excessive for these types

The evidence as a whole, indicates that the essential transfertentions taking place to the fermentation mannely, removal or the rankees or rawness common to all unformented tobacco a mellowing of the product, development of aroma, loss of gum, and darkening of polor are of the same character under all types of fermentation and aging though possibly varying in degree

These essential transformations can take place under employed differs which preclude growth of microorganisms. The interpretation which is more active types of termentation, however, with a moisture content of the tobarco as high as 30 to 40 per cent, microorganisms doubtless bring about other transformations which in some instances are so deep-scaled as to involve partial or even complete disintegration of the leaf tissue. For special purposes some of these secondary transformations may be desirable but in general they are not a part of the fundamental fermentative process.

DEPARTMENT OF COMMERCE TABULATION

April 18, 1952

I Hereby Certify. That the attached typewritten table entitled Employed Persons II Years Old and Over, by Major Industry Groups and Sex, for Quincy City, Gadsden County, Florida April 4, 1950 awas prepared from official tabulations of the returns of the Seventeenth Census of the United States, on file in the Bureau of the Census. These figures are preliminary and may not be in exact agreement with the distribution to be published in the final 1950 Census reports.

(Seal Impressed)

(S.) Roy Peel.

Director, Bureau of the Census.

Department of Commercia

Office of the Secretary

I Hereby Certain. That Boy V. Peel who sixed the foregoing certificate, is now, and was at the time of similar Process the Census and that had tauth and credit should be given his certification as such.

In Witness Whereof, I have the chair a this cribed my name and coursed the sent of the Department of Commerce to be affixed, this reighteenth day of April one thousand him hundred and faty (v.).

For the Secretary of Commerces

18) CORALD RYAN. Chief Cleri

(Sea Affixed)

Department of Compacee Buteau of the Census Washington 25

April 18: 1952

Employed Persons 14 Years Old and Over by Major Industry, Groups and Sex. for Quincy City, Gadsden County, Florida: April 1 1950

Major Industry Group	Number
Male, employed	1.676
Agriculture, forestry, & fisheries	212
Mining	
Construction	190
Manufacturing	
54 Transport, common, & other public util	72
Wholesale and retail trade	
Finance, insurance and real estate	55
Business and repair services	31,
Personal services	
Entertainment and recreation services	21
Professional and related services	
Public administration	
*Industry not reported	
Female, employed	
Agriculture, forestry, & fisheries	
Mining	
Construction	3
Manufacturing	
Transport, common, & other public util.	•
Transport, common, a other parties, and	

Major Industry Group				Number
Wholesale and retail trade				186
Finance, insurance, and real estate				13
Business and repair services			0	1
Personal services				258
Entertainment and recreition servi	ces			0
Professional and related services.				152
Public administration				25
Industry not reported				31

In United States District Cours

PLAINTHE'S MOTION TO STRIKE AFFBAVES SUPPORTING DEVEND-ANT'S MOTION FOR SUMMARY JUDGMENT - Filed August 29, 1952; as follows:

Plaintiff, Maurice J. Tobin, Secretary of Labor, United States Department of Labor, moves the Court to strike the affidavit of Waldo S. Carrell attached to defendant's Motion for Summary Judgment-filed heretofore in this cause.

For grounds of this motion, plaintiff, save

- 1. That the affidavit does not comply with the requirements of Rule 56(c). Federal Rules of Civil Procedure, either in form or contents since Rule 56(c) unequivocally requires that the affidavit must be made on personal knowledge and the affidavit does not set forth or establish that affiant has such personal knowledge of the matters set torch therein.
- 2. (a) That Rule 56(c) specifically requires that such an affidavit "shall set forth such facts as would be admissible in evidence" temphasis supplied) and said affidavit fails to comply with that requirement in that the matters set forth therein are immaterial and irrefevant to the issues in this cause and therefore would be inadmissible it evidence.
- 56 (b) That said affidavit s inadmissible and of no effect since the statements of affiant contained therein do not constitute the best evidence of the facts sugart to be established therein.

3. That the affidavit contains many ultimate conclusions of fact and beliefs without setting forth the facts themselves upon which said exclusions of fact and beliefs are predicated.

4. That affiant in his affidavit seeks to give opinion testimony as an expert and he has not been qualified to testify as an expert. Furthermore, even had affiant been properly qualified, his opinion, as distinguished from a statement of fact, should be stricken under the express terms of Rule 56 te).

Plaintiff, Maurice J. Tobin, Secretary of Labor, United States Department of Labor, further moves the Court to strike the follow-

ing portions of the affidavit of J. D. Vgieze attached to detend only motion for summary judgment filed heretotore in this cause for the reasons hereinafter assigned.

- 1. That portion commencing at the bottom of the sirst page of said affidavit which reads as follows: It is grown only in Godsden, I con and Mashson Counties, Florida, and in Decatur and Grady Counties theorgia, and nowhere else in the world unless in quantities that are inconsequential. The grounds for striking said portion are tar that the affidavit does not establish that affiant has personal knowledge of these matters, the that such statement represents a conclusion of facts, and set that the matter is
 - heatsay evidence and therefore inadmissible

 2. That portion commensions at line 5 to
- 2. That portion commercing at line 5 on the second page of said affidavit which reads as follows: The cost per acre of/production, and the price per acre which the tarmer receives for his crop, are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other types of wrapper tobacco grown in other sections of the country. The grounds for striking said portion are (a) that the affidavit does not establish that affiant has personal knowledge of the matters therein set forth. (b) that such matters represent conclusions of fact and not facts themselves, and (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein and purporting to be facts.
- 3. That portion commencing at line 6 on the third page of said affidavit which reads as follows: The annual production of all agricultural products in Gadsden County. Floridy, amounts to approximately \$12,000,000,000, including all grops, cattle and other farm products. The grounds for striking said portion are (a) that it is not set forth or established in the affidavit that affiant has personal knowledge of such matters, (b) that said affidavit does not establish that affiant is consecut to testify to such matters, (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein, and (d) that such matters are instanterial and irrelevant to the cause at issue and therefore would be madmissible as evidence.
- 4. That portion commencing at line 13 of the third page of the said affidavit which reads as follows: "Gadsden County. Floridic is an agricultural County and the town of Quiney is a pre58 dominently agricultural community, the majority of whose inhabitants gain their livelihood from and depend upon agriculture". The grounds for striking said portions are (a) that the affidavit does not set forth or establish that affiant has personal knowledge of said matters. (b) that nowhere in the affidavit has affiant been qualified as competent to testify as to such matters. (c) that such matters are clearly conclusions of fact, opinion and belief

and as such do not meet the requirement of Rule 56(c) that an affidayit shall and must set forth facts only, and (d) that affiant's statements do not constitute the best evidence of the matters set out thesein and therefore would be madmissible in evidence.

5. All the matters contained in that portion of said affidavit commencing at line 6 of the fourth page and continuing through the fifth, sixth and seventh pages of said affidavit which pertain in any mainter whatsoever to any and all internal changes in the tobaccolleaf during its growth or subsequent handling, processing, curing or bulking. The grounds for striking said portions are (a) that the affidavit nowhere establishes that affiant has personal knowledge of such matters set forth therein, (b) that these matters by their own terms establish that they relate to internal chemical changes in the tobacco leaf and it is obvious that affiant has not been qualified as an expert so as to be competent to testify as to these chemical changes. (c) that whether the leaf is in its or natural state is a conclusion of fact and law to be resolved from competent testimony concerning the chemical and other changes occurring in the leaf

during the growing, curing, bulking and other processing activities, and (d) that the statements by affiant contained in his affidavit would not be admissible in evidence and therefore do not comply with the mandatory requirements of Rule 56(e).

Wherefore, plaintiff prays this Court for an order striking the affidavits or portions thereof as set forth hereinabore.

Disted: August 28th, 1952.

(S.) WILLIAM S. TYSON,

(S.) BEVERLEY R. WORRELL,
Regional Attorney.

(8.) Robertson C. Hesse.

Attorney, United States Department of Labor, Attorneys for Plaintiff.

Post office address:
Office of Solicitor,
U.S. Department of Labor,
1908 Cemer Building,
Birmingham 3, Ala.

titt

AFFIDAVII OF ROBERT F GYRDER Filed September 2, 1952

STATE OF FLORIDA.

County of Guidaden

Robert F Gardner, being first duly sworm deposes and says that he is a citizen and resident of Quincy, in Consider County Florida and is employed as Manager of King Edward Tobacco Company. Warehouse No. 1 in the City of Quincy, and has been so employed. Since a date prior to January 25, 1950:

That the work of employees in such warehouse ht all such rines, in addition to the bulking or bulk, sweating of tobacco, included and includes also the sorting and bading of the leaf, but not stemming, -all such tobacco being baled and marketed by defendant

without stemming:

That this type of eight wrapper tobacco (U.S. No. 62), a shade grown tobacco grown almost entirely in Gadsden County, Florida, and adjoining counties of Florida and South Georgia, is and was at all such times customarily and regularly marketed and reselv for market only when bulked, sorted and baled, without stemming.

ROBERT F. CLARDNER.

Sworn to and subscribed before me this 30th day of August, 1952

WILLIAM H. MALONE.

Notary Public, State of Florida at Large

(Notarial Seal)

My commission expires Feb. 24, 1954.

61 In United States District Court

Memorandum Decision on Motion for Summary Judgment-Filed October 1, 1952

In this case plaintiff seeks to enjoin deteridant from alleged violations of the Fair Labor Standards Act of 1938, as amended (Title 29 USC, 201 et seq.). Plaintiff alleges that detendant employs approximately 120 employees in its packing house No. 1 in Quiney. Florida in the production of tobacco and pays such employees less than the minimum wages and fails to keep records required by the Act. In its answer defendant admits all the essential allegations of the complaint, except the alleged violations, which are denied and claims that its employees are exempt from the Act under Section 213 (a) Clauses (6) and (10).

The answer alleges that defendant is a "farmer" growing eight leat tobacco on its own tobacco farms in Cadsden County. Pounda and that all tobacco handled in its said packing house is tobacco around exclusively on defendant's farms and that all of defendant's coupleyers in said packing house were engaged in defendant's farming operations, including the preparation of such tobacco for market and also were ingaged in such operations in an agricultural connunity in halfalling, packing, drying and preparing said tobacco for market.

62 Confending that the pleadings raised only legal questions defendant filed a motion for summary judgment to which were attached affidavits of two persons. In openingtion therete plaintiff filed a motion to strike the affidavits filed by defendant, and also filed responses in the form of affidavits to defendant's motion for simmary judgment.

The Court has carefully considered the legal onestions raced by the pleadings and by the affidavits of the parties and is of the opinion that the factual questions presented by the pleadings are such that this case may not appropriately or safely be disposed of on motion for summary judgment and for this reason the motion will be denied.

There is also pending in this Court the case of Manuscot Tobin. Secretary of Labor, U.S. Department of Labor, plaintiff v. Joseph T. Budd, Jr. and Florence W. Budd, cospartners, doing business as J. T. Budd, Jr. & Co., defendants, Tallahassee Civil Action No. 205. That case was instituted prior to this case, is at issue and would have been tried during the last fiscal year, but for the fact that plaintiff's agency ran out of funds and was unable to be represented at the hearing when the case was set down for trial. The pleadings in the Budd case and the pleadings and affidavits in this case make it clearly evident to the Court that the production of type 62 tobacco is limited to two small areas in Florida; one of these contiguous to Quincy and the other being contiguous to Madisen; Florida. The pleadings in the Budd case disclose that in numbers of producers of type 62 tobacco more than 75% are small operators growing less than 25 acres of such pobacco annually and because of the

63 size of their operations are individually unable to own and operate a packing house for their exclusive use and are therefore, required to make arrangements with others for the drying, packing and preparing for market the eight leaf tobacco produced by them.

The two cases now pending in this Court present the trouble-ome question of whether, under the terms of the Fair Labor Standards Act, all the producers of type 62 eight leaf tobacco are exemption. It provisions of the Act, or whether some of them are entitled to comption and others are not. The Court is, therefore, of the

opinion that the Budd case and this case should be consolidated for trial and will be so consolidated, unless the parties are able to advance to the Court some valid reason why these cases under the consolidated for trial

The Court, malisposition of the issues raised to these cases, now states for the information or counselfor all participation in will be reductant to extend the equity arm of the Court for the epicebaron of any regulation promulgated by the secretary of Labor andre has PairyLabor Standards Act in a way that will exempt from the provisions of and Act those growers of type 62 tobarco will produce chericle totages in this type to justify exhibit and operating a parking large. Not their exclusive use and to plut the small growers out of business by making them subject to the provisions of said. Act and the regulations promulgated thereinder

The Court will set these cases down for a prestrial countryence with counsel for the respective parties on this country

as soon as it is possible.

Dated at Tallahassee, Florida, the 1st day of October, 1952

(S) Dozier A. DeVany intel States District Julia

In United States District Court

ORDER DENVING MOTION FOR SUMMARY JUDGMENT Filed October 1, 1952

This cause coming on before the Court surdefendant's motion for summary judgment and counsel for the respective parties having filed inemoting their thereon, after due consideration thereof, the Court has filed here with Memerandian Decision, and in conformity thereto, it is

Ordered and Adjudged that said motion for Summary judgment be and the same is hereby denied.

Done and Ordered at Tallabassee, Florida, this its, day of October, 1952

(S.) DOZIER A DEVANE.

United States District Judge.

In United States District Court

MOTION OF MAY TOBACCO COMPANY TO INTERVENE—Filed October 17, 1952

May Tobacco Company, a corporation duly organized and existing under the laws of Florida with its principal office in the City of Quincy in Gadsden County, Florida, hereby moves for leave to intervene as a defendant in this action, in order to assert the defense set forth, in its proposed answer, tendered with this motion, on the ground that motion is a farmer and producer of Florida shade grown eight wropper tobacco (U.S.-Type No 62), and also montains and operates within the corporate limits of the City of Quiney. Florida, its own tobacco packing plant, in which plant the novant bulks, sorts and bales only plant on the history of farms, exclusively.

And movant would show the Court that the plaintiff in the above entitled cause has centended and is now contending in said cause that the employee's employed in such a packing house as that operated by movant are engaged at working on sorting, tying and handling tobacco after it has been processed and put through the termentation process, and that such work is not agricultural labor and is not incidental to or in conjunction with farming activities, and that such work is more akin to industry than to farming, and that the bulking and other operations carried on in such a tobacco packing plant in the City of Quincy is a distinct and separate

in lustrial enterprise, that such bulking considers the first step in a manufacturing process rather than the last step in a growing process. And plaintiff claims that the point of cleavage occurs at the receiving platform of the packing house and that at this point of delivery, the tobacco undergoes a mean morphosis from a tarm product to a manufactured article

Moyant would also show to the Court that the plainting is the above entitled course has contended and is now contending in said cause that such leat tobacco during and after the bulking is not in its 'raw or natural state' and is not an agricultural commodity but has undergone extensive and controlled processing, and that in such bulking process is, in a sense, cooked' and is thus arrificially changed and thereby becomes no longer an agricultural commodity

And movement would farther show the Court than the plaintiff in the above entitled cause has contended and is contending in said cause that such a tobacco packing plant, because it happens to be located in a city having a population in excess of 25000 is not within the "atea of preduction" as that statutory term has been defined by the Administrator.

And, on such arguments, the plaintiff urges the Court to place all tobacco packing plants and all tobacco packing plants employees on an equal footing competitively and to thus avoid conferring a competitive advantage on one firm over another.

And so it is, that by such arguments on the part of the plaintiff, it is apparent that this suit, though in form a sub-for informagainst the named defendant, is in fact and in truth a test suit and is in substance and reality a suit seeking from the Court a declaratory judgment to be used as a precedent to

wheet and control all such tobacco packing plants and all such tebacco packing plant employees and so place all such packing plant employees on an equal feeting competitively.

And so it is movent would show unto the Court that movere has an interest in common with the defendant King Edward Tobacco Company of Florida in questions both of law and of that that six presented for devision in this action and movent has a defense to the plaintiff's claim herein which would present to the Court both questions of law and questions of fact which are common to the main action.

Movant further moves the Court for leave to file the answer tendered herewith.

May Tobacco Company.

Applicant: for Intervention.

By Fred L. May.

President

Messer & Willis. Ben & Willis.

Applicant's Attorney, 103-405 Midwette-Moor Building, Tallahassee, Florida.

Duty sworn to by Fred L. May, jural omitted in printing.

In United States District Court

ANSWER OF INTERVENER, MAY TORACCO COMPANY—Fried Octobere 17, 1952

Comes now the intervener May Tobacco Company, a Eforida corporation, by its undersigned attorney, and for answer 18 the complaint herein says:

This derendant admits the allegations of paragraph I of the complaint, except that this defendant does not admit but denies that this defendant has violated or, is violating the provisions of said Fair Labor Standards Act

11 8

Answering paragraph II of said complaint this defendant admits that this Court has jurisdiction to restrain violations of Section For or said Fair Labor Standards Act, but this defendant does not admit but denies that this defendant has violated or is violating any of the provisions of Section 15, or any other provision, of said Act.

States.

H

Answering paragraph 'III of said complaint, this defendant at all times bereinafter mentioned was and is a corporation duly organized and existing under and by virtue of the laws of the State of Florida, by virtue of which it is licensed to do business and is doing business at 104 East Washington Street in the City of Quiney, in Galfsden County, Florida, within the jurisdiction of this Honorable Court, where this defendant is engaged in the bulking, sorting and baling of cigar wrapper tobacco (U.S. Type No. 62), unstemmed.

IV

says at the height of the season, this defendant employs approximately seventy employees in and about its said tebacco packing plant, which is located at 104 East Washington Street in the City of Quiney, that such employees are engaged in the bulking, sorting, handling and baling of eight wrapper tobacco and this defendant admits that such operations constitute interstate commerce within the meaning of said Act, and that substantial quantities of such goods produced by this defendant's said employees have been and are being produced for interstate commerce and have been and are being shipped, delivered, transported, offered for transportation and sold in interstate commerce and shipped, delivered or sold with the knowledge that shipment, delivery or sale thereof in interstate commerce intended from this defendant's said place of business and packing plant in the City of Quiney to other

(b) Further answering said paragraph IV of said complaint this defendant alleges that this defendant is a farmer, and that at all times mentioned in said complaint and herein this defendant was continuously and actively engaged in farming operations and was actively planting, cultivating, growing and harvesting tobacco on the farms of this defendant in Gadsden County, Florida, all located within a distance of not exceeding ten miles from this defendant's said packing plant in the City of Quincy, and that at all times mentioned in said complaint and herein the acreage of this defendant's said farms included about 2800 acres in the aggregate, including woodland, grazing land and general farm land, including an average of between 80 and 100 acres of cultivated tobacco "under shade"; that all tobacco stored, bulked, sorted, baled or packed or in any manner handled at defendant's said packing house in the City of Quincy is and was at all times mentioned in said com-

plaint and herein none other than tobacco which was and is plainted, cultivated, grown and harvested on this defendant's aforesaid farms and not on or from any other farm or facing; and this defendant further alleges that the employees of this descendant in its said packing house in the City of Quiney were engaged in work and practices all performed for and by this defendant as an incident to and in conjunction with this defendant's said farming operations, including the preparation of this defendant's said tobacco crops for market, unstempted.

iendant alleges, in the alternative, that this defendant's employees at and in this defendant's said backing house were at all times mentioned in said complaint and herein all employed in an agricultural community and engaged in the han fling, packing, storing, drying and preparing for market of eigal caf tobacco in its raw or natural state, and that all such tobacco is and was at all times mentioned in said complaint and herein planted, cultivated, grown and harvest don and from the farms of this defendant located in Gadsden County, Florida, and within a distance not exceeding 10 miles from this defendant's said packing house in the City of Quincy.

the Further answering paragraph IV of said complaint this defendant alleges that of the 70 employees employed in said packing house at the height of the season, only 10% approximately of the total number of this defendant's employees employed in said packing plant live within the corporate limits of said City of Quiney and approximately 90% live outside the corporate limits of the City of

Quincy on the tarms of this defendant in Gadsden County, Florida, or on adjoining or nearby farm lands, and during the season that said employees are engaged in said packing plant, it is the practice and custom of this defendant to furnish transportation and to transport, aid employees by automob/le truck from their homes on the farms aforesaid into the City of Quincy to work in said defendant's packing plant.

(e) Further answering paragraph IV of said complaint this defendant alleges that for the past several years the total sales of to-bacco by this defendant from its said packing plant in the City of Quincy have averaged between \$300,000 and \$350,000 per year, and that the total 1952 tobacco crop harvested from the farms of this defendant as aforesaid and bulked, sorted, baled and handled or to be bulked, sorted, baled and handled in this defendant's said packing house will amount to approximately 112,000 pounds, green weight.

1

Answering paragraph V of said complaint this detendant alleges that this defendant has not violated and is not violating the pro-

visions of Section 6 or Section 15(a) (2) of said Act, either by paying to its said employees for their employment in the production of goods for interstate commerce as aforesaid, or in any other employment and that, on the confrary, the employees of this defendant in this defendant's said packing plant are exempt from the provisions of said Act under clauses (6) and (10) of Section 13(a) thereof.

73 , VI

This defendant admits the allegations of paragraph VI of said complaint, but this defendant alleges that said regulations, or said. Act for the reasons and because of the facts bereinabove set forth, are not and were not applicable to the employees of this defendant in this defendant's said packing plant or to the activities of this defendant in said packing plant.

VII

Answering paragraph VII of said complaint this defendant says that this defendant is not subject to the provisions of said Act, and alleges that this defendant has not violated and is not violating the provisions of said Act.

VIII.

This defendant admits the allegations of paragraph VIII of said complaint and admits that since January 25, 1950, this defendant has shipped, delivered, transported, offered for transportation and sold in interstate commerce and has shipped, delivered, or sold with the knowledge that said shipment, delivery or sale thereof in interstate commerce was intended, from its said place of business and packing plant in the City of Quincy, to other States; goods,—to-wit: unstemmed cigar wrapper leaf tobacco—but this defendant alleges the truth to be that this defendant has not violated and is not violating the provisions of said Act and alleges that this defendant and the employees of this defendant mentioned herein who were employed in this defendant's said packing plant

have get been and are not being employed in violation of Section 6 of said Act or of any other provision thereof.

IX

Answering paragraph IX of said complaint this defendant alleges that this defendant has not violated and is not violating the provisions of said Fair Labor Standards Act.

Wherefore, this defendant prays judgment of this Honorable-Court declaring that the employees of this defendant in this defendant's said packing plant in the City of Quincy are exempt from the provisions of said Act under and by virtue of clauses (6) and (10) of Section 13(a) thereof.

MAY TOBACCO COMPANYS

Applicant for Intercention
By Free L. MAY.

Misser & Willis,

BEN C. Willis,
Applicant's Attorney,

403-405 Midyette-Moor Building, Tallahassee Florida:

75 In United States District Court for the Northern District of Florida, Tallahassee Division

No. 340-T-Civil

MAURICE J., TOBIN, SECRETARY OF DABOR, UNITED STATES DEPART-MENT OF LABOR, PLAINTIFF.

King Edward Tobacco Comigny of Florida, a Florida Corpora-

MAY TOBACCO COMPANY, A CORPORATION, INTERVENER

No. 305-T-Civ.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPART.

JOSEPH T. BUDD, JR. AND FLORENCE W. BUDD. CO-PARTNERS DOING BUSINESS AS J. T. BUDD AND COMPANY, DEFINDANTS

Notice of Hearing—Filed November 14, 1952

To: All Counsel of Record

Please Take Notice that on Wednesday, December 10, 1952, at 10:00 o'clock A.M. in Chambers of the Hon. Dozier A. DeVane, Judge of said Court, in the U.S. Post Office Building in the City of Tallahassee, Florida, there will be a Pre-Trial Conference in the above entitled actions on a hearing on the Motion to Intervence of May Tobacco Company. By direction of the Judge of said Court.

Dated this November 10, 1952.

(S.) RICHARD J. GARDNER,

(S.) EDW. McCARTHY.

' Attorneys for Defendant. King Edward Tobacco Company

Affidavit of Service (Omitted in printing)

77 In United States District Court

Order Allowing Intervention of May Tobacco Company— Filed December 17, 1952.

This cause came on this day to be heard on the motion of May Tobacco Company. Inc., a corporation, for leave to intervene as additional in the above styled cause and for leave to file its answer tendered with Sud motion to intervene, and the argument of coursel for the respective parties having been heard, and the Court being advised of its opinion in the premises, it is thereupon, on consideration thereof.

Ordered and Adjudged that said motion be and the same is hereby granted, and, that said May Tobacco Company. Inc. be and the same is hereby made a party defendant in this cause and that the said answer tendered be filed and made a part of the plendings in this cause.

Done and Ordered at Tallahassee, Florida this 17th day December, 1952.

> Dozrer A. Detane. United States District Judge.

In United States District Court

Superation for Substitution of Party Plaintiff Filed February 11, 1953

It is hereby stipulated that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor, United States Departs ment of Labor, his appointment as Secretary of Labor by Dwight D. Eisenhower, President of these United States, having been confirmed by the Senate of these United States on January 21, 1953, and that said Martin P. Dürkin has succeeded to alternating duties and functions heretotore vested in the plaintiff. Maurice J. Tobin, former Secretary of Labor, and that said Martin P. Durkin, Secretary of Labor, may be substituted herein as plaintiff in the place and stead of the said Maurice J. Tobin, and that an order may be chiefed herein to that effect an dthat this causeomay be continued and maintained by said Martin P. Durkin, as Secretary of Labor.

Dated this 9th day of February, 1953.

WILLIAM S. TYSON,

Solieitor.

Beverley R. Worrell, Regional Attorney,

ROBERT C. HESSE.

Attorney.

United States Department of Labor.
Attorneys for Plaintiff

GARDNER AND LINES. By RICHARD J. GARDNER,

Attorney for Defendant.

Messer and Willis,

By BEN C. WILLIS,

Attorney for Intervener.

In United States District Court

Order Substituting Martin P. Durkin as Plainthe Filed February 11, 1953

The parties hereto having stipulated that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor. United States Department of Labor, and that as such he has succeeded to all the rights, duties and functions of Maurice J. Tohin, heretofore appearing as the Secretary of Labor, United States Depart-

ment of Labor, and the plaintiff in this cause; and that said Martin P. Durkin, Secretary of Labor, be substituted as plainfiff herein in the place and stead of said Maurice J. Tebin, it is

Ordered that Martin P. Durkin, Secretary of Labor, be and he hereby is substituted as plaintiff herein in the place and stead of Maurice J. Tobin, former Secretary of Labor, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said Martin P. Durkin, Secretary of Labor.

Dated this 11th day of February, 1953.

Dozier A. DeVane. United States District Judge

'In United States District Court

STIPULATION OF FACTS—Filed August 3, 1953

Comes now the plaintiff and the defendant by their respective attorneys and for purposes of this action, stipulate and agree as follows:

- 1. That during the period of time involved in this action the defendant, King Edward Tobacco Company of Florida, did employ. and is employing, many of its employees engaged in the handling of tobacco in and about its place of business known as packing
- house No. 1 located at Quincy, Florida, at wage rates less than sever y-five (75) cents an hour.
- 2. That the defendant, King Edward Tobacco Company of Florida, has not, during the period involved in this action, made, kept and preserved records of hours worked each workday and each workweek for each of its said employees as prescribed by the Regulations, Part/516; Title 29, Chapter V, Code of Federal Regulations, Part 516, issued by the Administrator of the Wage and. Hour Division, United States Department of Labor; pursuant to the authority vested in him by Section 11(c) of the Fair Labor Standards Act of 1938 as amended (Title 29, U.S.C., 211 (c)).
- 3. That the defendant, King Edward Tobacco Company of Florida, has, throughout the period involved in this action, regularly and customarily shipped, delivered and sold or caused to be shipped, delivered and sold, tobacco so handled by its employees employed at rates of pay less than seventy-five (75) cents an

hour with knowledge that shipment, delivery and sale of said too bacco in interstate commerce was intended.

Jefer S. Ray,
Acting Solicitor,
Beverley R. Workell,
Regional Attorney.

82 H. Grady Kirven. Attorney.

United States Department of Labor, Attorneys for Plaintiff.

McCarthy, Lane & Adams, Attorneys for Defendant,

By Edw. McCarthy.
Gardner and Lines.
Attorneys for Defendant.

By RICHARD J. GARDNER.

In United States District Court

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENTS Filed August 3, 1953.

Comes now the plaintiff by his attorney and hereby moves the Court to enter summary judgment for the plaintiff, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings, affidavits and all other documents and papers filed in this cause and all the proceedings heretofore had berein, together with the stipulation attached hereto, and hereby made a part hereof, show that there is no genuine issue as to say material fact and the plaintiff is entitled to judgment as a matter of law.

(S.) Stuart Rothman,
Solicitor,
(S.) Beverley R. Worrell,
Regional Attorney,
(S.) H. Grady Kirven,
Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

(Certificate of Service Omitted.)

In United States District Court

Defendants Motion for Summary Judgment—Filed August 8, 1953

Comes now the defendant King Edward Tobacco Company of Florida, a corporation, by its undersigned counsel, and moves the

Court for Summary Judgment on the pleadings and affidavits, including the Affidavit of J. D. Vrieze herewith submitted and the affidavit of Waldo S. Carrell heretofore filed herein August 7, 1952; and for grounds of this motion, said defendant would show

84 to the Court that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law denying the injunction and dismissing the plaintiff's complaint.

Dated this August 7, 1953.

(S.) EDW. McCarthy,
423 Atlantic National Bank Bldg.,
Jackson ille, Florida.
(S.) Richard J. Gardner,
Quincy, Florida.

(Certificate of Service Omitted.)

AFFIDAVIT OF J. D. VRIEZE-Filed August 8: 1953

STATE OF FLORIDA, County of Gadsden:

J. D. Vrieze, being first duly sworn, deposes and says;

I am a resident of the town of Quincy, Gadsden County, Florida, and am employed by King Edward Tobacco Company, a Florida corporation, in the capacity of General Manager.

85 I have been engaged in the business of planting, raising, curing, buying, selling, warehousing and packing cigar leaf

tobacco for a period of 32 years. *,

The King Edward Tobacco Company of Florida, of which I am General Manager, is engaged in the business of planting, raising, harvesting, curing, warehousing and packing of cigar wrapper leaf tobacco in Gadsden County, Florida. Said corporation is now and has been at all times mentioned in the complaint and answer filed in this cause operating shade tobacco farms in Gadsden County, Florida, having a total acreage of not less than 3097°, acres including cultivated land, uncultivated land, woodland and pasture. The total acreage of defendant's farm lands actually under cultivation is 732° acres, including 170° acres of "shade"

on which U.S. Type No. 62 Tobacco is grown under muslim cloth or cheesecloth. These figures revised after submitting the "columnar chart".

U. S. Type No. 62 tobacco is used exclusively for cigar wrappers. It is grown only in Gadsden, Leon and Madison Counties, Florida, and in Decatur and Grady Counties, Georgia, and nowhere else in the world, unless in quantites that are inconsequential. The crop is grown in fields which are completely covered and enclosed with a cheesceloth shade. The cost per acre of production, and the price per acre which the farmer receives for his crop, are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other types of cigar wrapper tobacco grown in other sections of the country.

86 King Edward Tobacco Company owns, and operates a warehouse in the town of Quiney, known as Warehouse No. 1, to which is brought, and in which is bulked and packed shadegrown eight wrapper leaf tobacco (Type No. 62) produced exclusively on said Americans in Gadsden County, Florida, all within a radius of Language County within a radius of Language County.

The bandling of tobacco in defendant's said Warehouse No. I consists of receiving the tobacco from the curing barns on the tarm and piling the tobacco leaf on the floor of the warehouse into piles or bulks; each containing between 3500 and 4500 pounds of tobacco; and during the period of approximately 2 to 4 months that such tobacco is so piled in bulks, the bulks are taken down from time to time and repiled or re-bulked; and in 81ch re-bulking, the object is to take out the "hands" of tobacco from the middle of the bulk and place them on the outside, at the same time taking the "hands" that were on the outside of the bulk and placing them in the interior of the bulk. Such re-bulking is for the purpose of acrating the leaf and preventing an excess heating or fermentation in the interior of the bulk, and to assure that the natural changes in the leaf, which are hereinafter described, will be as uniform as possible in all the leaves throughout the entire bulk.

After such bulking of the tebacces leaf, as bereinabove described, or shiring the latter stages of such bulking, the hands of tobacco are acrated and sprayed for the purpose of keeping the leaf sufficiently moist to withstand handling.

When the bulk-scenting is completed and the temperature of the bulk ceases to rise, the bulk is taken down, and the tobacco leaves are sorted and graded by hand and re-bulked to dry out over a further period of from 2 to 4 months and are then balled in bundles or packages, unstemmed, for sale and shipment to the cigar manufacturer.

Except such employees as are engaged part time in maintenance work in and about the building, and such as are engaged in administrative and elerical office work, all defendant's employees in

said packing plant do not do any other work than that hereinabove described. None of the tobacco leaf handled in or shipped from said warehouse is steringed, cut, treated or processed otherwise than as herein described.

Within the corporate hunts of the town of Quiney there are also 12 other eigar leaf tobacco warehouses, to which warehouses are brought, bulked and packed shade-grown eigar wrapper leaf tobacco produced in Gadsden County, Florida, also Leon County, Florida, and Decatur and Grady Counties, Georgia.

All the shade-grown tobacco (Type 62) grown in Leon and Gadsden Counties, Florida, and in Degatur and Grady Counties. Georgia, is produced within a radius of 30 miles from the town of Quincy. The average annual production of share-grown Type 62 in this area is approximately five million pounds. Of this average annual production an average of approximately three million pounds is brought to and warehoused in the town of Quincy.

The annual production of all agricultural products in Gadsden County, Florida, amounts to approximately \$12-000,000,00, including all crops, cattle and other farm products; and the average annual production of shade-grown cigar wrapper leaf tobacco in Gadsden County, Florida, is approximately \$9.000,000,00 of which is brought to, bulked and packed in warchou es located in the town of Quincy. Gadsden County, Florida, is an agricultural County and the town of Quincy is a predominantly agricultural community, the majority of whose inhabitants gain their livelihood from and depend upon agriculture.

In harvesting this type of tobacco, as each leaf reaches a certain state of maturity on the stalk, it is picked or "primed", the lower leaves being first picked, perhaps two or three from each stalk; and this "priming" is repeated from 4 to 7 times on up the stalk as the tobaco leaves mature. The leaves so picked are called "first primings" or "sand leaves", "second primings", "third primings", and so on. At each priming the leaves are immediately taken into the curing barn; strung and hung on sticks to dry. Although leaves of several different princings are hung in the same barn at the same time, as each priming completely loses its green color and becomes a shade of brown, it is taken down, packed foosely in boxes and carried to the warehouse where it is placed in bulks on the floor of the warehouse. The transference from the curing barns to the bulks must be prompt, in order to avoid any harmful stoppage or acceleration of the intra-cellular changes that are continuously taking place within the leaf.

from the time it is first hing in the tobacco barn after priming until the time that the bulk sweating is completed is one entire and continuous process of natural transformation within the leaf itself necessary to make the leaf in its raw and natural

-state fit for the only use for which it is produced. wrapper tobacco, as distinguished from filler and binder types of tobacco, is as necessary, or more necessary, for the purpose of assuring the desired color and general appearance than for the purpose of affecting its flavor or arema. This continuous natural internal transformation is completed without the addition, application or use of any external catalyst or other chemical or artificial stimulation or processing, other than to control and regulate temperature. Atmospheric temperature is controlled in the curing barn, and the temperature of the bulks is controlled in the warehouse by taking down and rebuilding the bulks from time to time as herein explained. Such temperature control is necessary to prevent either an injurious acceleration or an injurious stoppage of the natural internal transformation of the leaf, which is a gradual and continuous process of drying and exidation, accompanied by intra-cellular activities of uncro-organisms and of the internal organic chemicals" within the leaf

The changes in the tobacco leaf which occur after the leaf is taken from the barn and put into the warehouse are such as rould be allowed to continue, and would continue, if the leaf were left in the curing barb, if the barn had proper temperature and atmospheric control. There are not enough curing barns on the farm to accommodate or store all the tobacco that would have to be accumulated and stored during the entire period 90 of time from the first harvesting or priming until the time that the bulk sweating is completed and the tobacco ready for grading and packing. Moreover, the natural peces winch continue through the period of bulk sweating in the warehouse would be too slow and would take too long if the tobacco leaf were left hauging in the curing barn on thelfarm; and such natural processes would not have a uniform result on all the tobacco leaves unless the temperature of bulks were watched and controlled by taking down and se-bulking.

When the green feat is primed on the farm and first hung in the curing barn its water content is 80% to 85%, and the inital stages of curing the leaf in the barn consist primarily of a natural and gradual drying of the leaf and the evaporation of the large excess of water, which must be at such a rate and under such conditions as will not injuriously interfere with the accompanying intra-cellular chemical transformation, that take place contemporaneous, and continuously throughout the entire curing and bulk sweating process. The most obvious change which occurs in the leaf while undergoing barn curing is (1) the loss of water, which is reduced from 80% to 85% content to a moisture content of between 10% and 25%, and (2) the loss of its green color and a coloring of the leaf; but irrespective of the moment when the leaf

is removed from the curing barn into the warehouse it is impossible to say that what moment of time, or that at any particular moment of time, those intra-cellular changes which are predominant

during the barn-curing period cease and those intra-cellular changes which are predominant during the period of bulk sweating begin. In other words, the intra-cellular transformation which is predominant during the period of barn curing on the farm continues to take place after the leaf is moved into the warehouse and the bulk sweating is begun; likewise, those intra-cellular transformations which are predominant during the period of bulk sweating actually have their incipiency while the leaf is still hanging in the curing barn on the farm.

Thus, for instance, the loss of moisture which is more rapid during the period of barn-curing on the farm continues throughout the period of bulk sweating in the warehouse, although at a slower rate. And the coloring of the leaf which commences in the curing barn also continues during the period of bulk sweating, the leaf becoming a deeper green, red or brown. The most notable chemical changes in the consistency of the leaf are a decrease in malic acid and nicotine content, which is continuous throughout the period of barn-curing and the period of bulk sweating; also a rise in the citric acid content during the period of barn-curing followed by a reduction of the citric acid content during the period of bulk This latter change, first in the accumulation and then In the loss of citric acid, is not a sudden change, but gradual, and is believed to be due, not to the fact that the leaf is taken out of the curing barn and put into bulks in the warehouse, but to the effect of other accompanying internal chemical changes and activities of intra-cellular micro-organisms.

During the period of bulk sweating the leaf undergoes a most noticeable fermentation caused by the activities of intra-cellular micro-organisms. Although most pronounced during the period of bulk sweating fermentation actually begins during the time that the leaf is still hanging in the curing barn on the farm. The process of bulk sweating is not for the purpose of causing such fermentation, but for the purpose of controlling and regulating it so as not to injure the leaf or destroy its flavor, aroma, burning qualities or its important color and general appearance, and so as to assure that all the leaves in an entire buil, will be affected uniformly and not haphazardly.

After the bulking process in the warehouse is completed, and before the leaf is graded and baled, the leaf is remoistened, being sprayed with a fine spray. This remoistening, or "kasing", as it is called, is not for the purpose of stimulating or affecting the process of fermentation, but is for the purpose of keeping the leaf

soft and phable enough to withstand necessary handling without breakage or injury.

I D VRHZE

Sworn to and subscribed before me this 7th day of August, 1943 Arick B. Mitchell,

Notary Public .

(Notarial Seal)

My Commission expires: May 9, 1955.

93 In United States District Court

PLAINTIN'S MOTION TO STRIKE PORTIONS OF AFFIDAVIT FILED IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - Filed on August 17, 1953.

Plaintiff, Martin P. Durkin, Secretary of Labor, United States Department of Labor, moves the Court to strike the following portions of the affidavit of J. D. Vrieze attached to defendant's motion for summary judgment filed heretofore in this cause for the reasons hereinafter assigned.

- 1. That portion commencing at the bottom of the first page of said affidavit which reads as follows: "It is grown only in Gadsden, Leon and Madison Counties, Florida, and in Bocatur and Grady Counties, Georgia, and nowhere else in the world, unless in quantities that are inconsequential". The grounds for striking said portion are (a) that the affidavit does not establish that affiant has personal knowledge of these matters, (b) that such statement represents a conclusion of facts, and (c) that the matter is hearsay, evidence and therefore madmissible.
- 2. That portion commencing at line 3 on the second page of said affidavit which reads as follows: "The cost per acre of production, and the price per acre which the farmer receives for his crop, are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other

94. types of wrapper tobacco grown in other sections of the country". The grounds for striking said port on are (a) that the affidavit does not establish that affiant has personal knowledge of the matters therein set torth, (b) that such matters represent conclusions of fact and not facts themselves, (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein and purporting to be facts, and (d) is not material to any issue in this case and is therefore insadmissible.

96

3. That portion commencing at line 9 on the fourth page of said affidavit which reads as follows: The annual production of all agricultural products in Gadsden County, Florida, amounts to approximately \$12,000,000,000 including all crops, cattle and other farm products. The grounds for striking said portion are (a) that it is not set forth or established in the affidavit that affiant has personal knowledge of such matters. (b) that said affidavit does not establish that affiant is competent to testify to such matters, (c) that affiant's statements of these matters do not constitute the best evidence of the matters set forth therein, and (d) that such matters are immaterial and irrelevant to the cause at issue and therefore would be inadmissible in evidence.

4. That portion commencies at line 16 of the fourth page of the said affidavit which reads as follows: "Gadsden County, "lorida, is an agricultural County and the town of Quincy is a predominantly agricultural community, the majority of whose inhabitants gain their livelihood from and depend upon agriculture".

The grounds for striking said portions are (a) that the affi-95 davit does not set forth or establish that affiant has personal knowledge of said matters, (b) that nowhere in the affidavit has affiant been qualified as competent to testify as to such matters. (c) that such matters are clearly conclusions of fact, opinion and belief and as such do not meet the requirement of Rule 56 (c) that an affidavit shall and must set forth facts only, and (d) that affiant's statements do not constitute the best evidence of the matters set out therein and therefore would be inadmissible in evidence.

5. All the matters contained in that portion of said affidavit commencing at line 11 of the fifth page and continuing through the fifth, sixth and seventh, eighth and ninth pages of said affidavit which pertain in any manner whatsoever to any and all internal changes in the tobacco leaf during its growth, or subsequent handling, processing, curing or bulking. The grounds for striking said portions are, (a) that the affidavit nowhere establishes that affiant has personal knowledge of such matters set forth therein, (b) that these matters by their own terms establish that they relate to internal chemical changes, in the tobacco leaf and it is obvious that affiant has not been qualified as an expert so as to be competent to testify to these chemical changes, tel that whether the leaf is in its raw or natural state is a conclusion of fact and law to be, resolved from competent testimony concerning the chemical and other changes occurring in the leaf during the growing, curing, bulking and other processing activities, and (d) that the state-

ments by affiant contained in his affidavit would not be admissible in evidence and therefore do not comply with the mandatory requirements of Rule 56 (e).

Wherefore plaintiff prays this Court for an order striking the portions of the affidavit as set forth hereinabove.

Dated: August 14th 1953.

STUART ROTHMAN.
Solicitor.
Beverley R. Worrell.
Regional Attorney.
H. Grady Kirven.
Attorney. United States Department of Labor. Attornews for Plaintiff.

Post office address:

Office of Solicitor. .

U.S. Department of Labor, 1908 Comer Building, Birmingham 3, Alabama.

Certificate of Service (omitted in printing)

97 In United States District Court, in and for the Northern District of Florida, Tallahassect Division

Case No. 305-T-Civ.

MARTIN P. DRUKIN, SECRETARY OF LABOR, UNISED STATES DEPART-MENT OF LABOR, PLAINTIEF.

JOSEPH T. BUDD. JR. AND FRORENCE W. BUDD. CO-PARTNERS. DOING DISINESS AS J. F. BUDD. JR. AND COMPANY, DETENDANTS

Case No. 340-T-Civ.

MARTIN P. DORKIN, SECRETARY OF LABOR, UNITED STATES DEPART-MENT OF LABOR, PLAINTILE.

King Edwird Tobacco Company of Florida, a Florida corporation, defendant

MENORANDUM DECISION. Filed September 29, 1953

1. S. Type 62 Sumatra tobacco is a leaf tobacco grass; and used extensively for eigar wrappers and grown exclusively in two areas in Florida and one small area in Georgia. The principle area where this tobacco is grown is in Gadsden and Leon counties, Florida and in Decatur and Grady counties, Georgia.

contiguous to the Florida counties named above. All this type of tobacco grown in these counties is grown within an arrine radius of thirty miles of the town of Onney in Gadsden County Florida and is processed and packed in packing houses located chiefly in and around Quincy. In the Quincy area of production there are 300 farmers growing this type of tobacco of which 80% grow and harvest less than 25 acres per year. A small amount of this type of tobacco is also grown in Marison County, Florida.

History of Litigation.

Plaintiff originally brought suit against Joseph T. Budd, Jr. and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company, to enjoin this company from violation of the Fair Labor Standards Act (29 USCA, Sec. 201 et seq.). This suit was instituted on February 10, 1951. The facts in the case, as disclosed by the pleadings and supporting evidence filed in the case, show that the Budd Company grows no Type 62 tobacco, but operates a packing house where it processes the tobacco grown by many small farmers.

At a pre-trial conference held in February, 1952, after the case was at issue, it developed that of the 11 remaining packing houses in the Quincy area processing Type 62 tobacco for shipment and sale, and who had not complied with the Fair Labor Standards Act, 6 processed in addition to tobacco grown by themselves, tobacco grown by others, and the remaining 5 processed tobacco grown by themselves alone.

It was obvious to the Court, at the conclusion of the pretrial conference, that the Budd Company operation was in violation of the Fair Labor Standards Act. A decision to that effect in that case would have adversely affected the 6 other operators not in compliance with the Act, who process and pack tohacco grown by small farmers. It also appeared to the Court at that time that any decision in the Budd case would not immodiately affect the packing house operators who process their own tobacco exclusively. The overall result would have been disastrous to the small growers of Type 62 tobacco. Therefore, the Court, insisted that before decision in the Budd case, the Administrator bring suit against an operator processing tobacco grown exclusively by it, so that the Court could determine whether the Act was applicable to their packing house operations as well. The Administrator, accordingly brought suit against the King Edward Tobacco Company of Flor-This suit was filed on March 23, 1952. The May Tobacco Company intervened and is a party defendant in this suit.

The nature of the alleged violations in the King Edward Tobacco Company case are the same as those alleged in the Budd case. When this case became at issue on the pleadings and supopering evidence introduced by the parties, defendant. King hidward Tobosco Company: filed a motion for summary judgment, contending that the essential facts were not in dispute and that on the undisputed facts defendant is exempt from the Fran-

100 Labor Standards Act, under Clauses (6) and (10) of Section 213(a) of the Act. Because of collateral factual issues raised by plaintiff in this case, which the plaintiff was unwilling to waive at that time, the Court was compelled to and did, deny.

defendant's motion for summary judgment.

At a pre-trial conference held in this case and in the Budd case, on a later date, the Court announced to the respective parties that in its opinion the essential facts in each of these cases are not in dispute and that upon each party plaintiff and detendant waiving the unessential questions raised in their pleadings and supporting evidence by filing motions for summary judgment the Court would pass upon these motions and determine wisther the operations of these defendants at their packing houses are subject to the Fair Labor Standards Act.

Due, however, to the effect such a decision would have upon these defendants should the decision so adversely to them; have leaving all their competitors free from compliance with the struntil their cases were adjudicated, the Court further suggester and the Administrator acquiesced in the proposal of the Court that suits be brought against every packing house operator in the Quincy area not in compliance with the Act and that these cases be brought to issue in the same way as the cases then before the Court. This has been done. There are 15 packing houses operating in this area. Similar, suits are now pending against the operators of 12 of these packing houses, which are at issue. The essential facts in each case are not in dispute and the sole question before the Court is whether packing house employees are exempt

under Clauses (6) and (10) of Section 213 (a) of the Act

101 The Court is now in position to render judgment in all these

c cases that will be applicable to all of them alike at the same time and no injustice will be done anyone, however the cases may go. The remaining a packing houses have complied with the provisions of the Act

Method of Growing, Harvesting and Marketing Type 62 Shade Leaf Tobacco

Type 62 shade leaf tobacco requires special and painstaking cultivation, baryesting, curing and preparation for market. It grows in fields inclosed in a cheesecloth shade, which completely covers and incloses the tobacco field. The cheeseloth is supported by wires strung on posts placed at regular intervals through the

field. It is highly fertilized and estensively cultivated during the growing period. When each lear reaches a certain stage of maturity it is promptly harvested. This harvesting is known as sprining. The lower leaves are picked first, perhaps not more than two or three from stalk. This picking is repeated as the tobacco matures on up the stalk until the marketable leaves have been removed. At each prining the tobacco is monediately taken to a tobacco barn located on the farm where it is strong on sticks and dried by means a heat. When the tobacco is almost completely dried the drying process is interrupted and it is permitted to absorb moisture and again dried. This drying process is repeated until the tobacco has reached a stage in the process of curing when it is teady for the packing house.

It is then taken from the barns in the field, placed in appropriate containers and carried to the pasking boase where 102—it is placed in piles known as "bulks" for curing. Each bulk consists of more than 2000 lbs of tobacco. The pasking bouses are equipped with ranchinery for the appropriate humidification and curing of the tobacco. During the curing period the temperature within each bulk is closely watched from day to day and at regular intervals, when the appropriate time has arrived, the bulk is broken up the tobacco leaves shaken out and those on the outside placed on the outside for further curing. This process is continued until the tobacco is ready for market when it is bailed for shipment.

In the Quincy area, for the year 1950, approximately 2554 acres were planted to Type 62 shade leaf tobacco. Of this total acreage 1459 acres were grown by companies operating parking bouses that handled no tobacco save that produced by them. Small producers owning no packing houses but depending on orkers for the preparation of their tobacco for market-grew 784 acres and the packing houses that processed this tobacco also grew and processed for their own account 311 acres.

The Budd Case

The Build Company grows no tobacco for its own account, but processes and prepares for market in its packing house tobacco grown by others. For the year 1950 this company processed the tobacco grown by 52 small farmers on 263 acres. The Build Company entered isso a contract with each of these farmers under which each farmer theoretically took over the packing house with all its contingent and the entaloress (accurate

103 own tobacco and sold the tobacco, when processed, to the

Budd Company. A system of bookkeeping was set up by which each farmer paid to the Budd Company the actual cost of the processing of the tobacco grown by him, and the Budd Company paid the employees. During the year 1950, 333,889 lbs. of tobacco of these 52 farmers was processed in the Budd Company's packing house.

It was all purchased by the Budd Company. The Budd Company sold 231,209 lbs, of this tobacco to the Budd Cigar Company; a corporation of Quincy. Florida. The remainder of the tobacco was sold to other persons, firms or conjugations, much of which.

went into interstate commerce.

Little need be said as to the plan adopted by the Burlel Company to circumvent the Fair Labor Standards Act. The arrangement was conceived and pat into effect solely for this purpose. This law may not be circumvented in this manner and the plan adopted did not accomplish the result desired. The Budd Company operations are clearly subject to the provisions of the Fair Labor Standards Act, with reference to the compensation of all condovers working on the tobacco or in connection therewith in the Budd backing house. Famis Reservoir & Irrigation Co. v. McComb. 337 U.S., 755; McComb v. Super-A Fertilizer Works. Inc., 165 Fed. 2nd, 824.

The King Edward Tobacco Company Case.

In the King Edward Tobacco Company case the facts are entirely different from those in the Budd case. Draing 104—the year 1950 the King Edward Tobacco Company cultivated 206 acres of Type 62 shade left tobacco. The process of growing, harvesting and drying this tobacco in the barns on the farms where the tobacco was grown and in bulking, curing and preparing the tobacco for market in the packing house was ac same as that generally outlined heretokere.

When the tobacco reached the stage in the process of curing, when it was ready for the packing house, the King Edward Tobacco Company took it to one of its packing houses where no

other tobacco was processed and made ready for market

The King Edward Tobacco Company operated two other pasking houses where tobacco grown by others is processed and made ready for market and defendant concedes that these parising house operations are subject to the Act, but as it uses the packing house involved in this suit to process tobacco grown only by it, it claims exemption for this operation from the provision of the Act. The tobacco processed by the defendant in this packing house is sold chiefly to an affidiate of the defendant.

The packing house in question is located within the corporate limits of Quincy. Florida, and is not located on any of the farms operated by defendant. In this case the issue is whether the

packing house employees are entitled to the benefits of the Fair Labor Standards Act or whether defending's operations are exempt therefrom under Clauses (6) and (10) of Section 213(a) of the Act.

Plaintiff concedes that all labor employed in the growing, harvesting and handling of the tobacco up to the time it reaches, the platform of the packing house is exempt, but as soon as this tobacco is delivered to the packing house, all employees engaged in the handling of it thereafter or who work in any other capacity in connection with its handling, are subject to the Act. Defendant's position is that the farming operation in connection with the handling of this tobacco does not cease until the tobacco is prepared for market and made ready for shipment, which would exclude every employee in the packing house working become in connection therewith.

This question has been before the Court in primerous cases and there is some conflict among the decisions as 1, where the famous exemptions end and the Wages and Hours provisions of the Full Labor Standards Act applies. 1500, Flewing v. Farmers, Pelanut Co. 15th Cir.), 128 Fed, 2nd, 404 and Puerto Rico Toba en Market ing Cooperative Assing v. McComb (1st Co.), 181 Fed. 2nd, 697 On the same day the Court of Appeals, 5th Circuit, decided Floring v. Farmers Peanut Company; sugra, it also decided Floring w. Jacksonville Paper Company, et al., 128 Fed, 2nd, 395. While the Court of Appeals reversed the Jacksonville Paper Commune case in that case. The Administrator carried the Jacksonville Paper Company case to the United States Supreme Court see Walling Admiry, Jacksonville Paper Company, 317 U.S., 561. The Sharmond Court affirmed the judgment of the Court of Appeals, 5th Circuit reversing the District Court in that case, but meso down he wishes

Court of Appeals adopted "too narrow a construction of the, 106". Act "in its Opinion in that case.

the reasoning in the later cases it is not difficult to draw the late in this case. This Court finds and fields that upon the record to the case the termine exemption ends when the tobacco reaches the receiving platform of the packing house for processing and packing purposes for use or sale in the market. The Court considers it innecessary to labor this point as this onession has been difficiently considered and expounded in the cases relied upon by this Court to sustain its findings and holdings herein. Walling, Adm. v. Jackson-ville Paper Co., 317 U.S. 564; Farners Reservoir & Brigation & v. McCouch, 337 U.S. 755; Wailana Agr. Co. v. Manega, 97 Led. Supp., 198; Calaf v. Gonvales, 127 Fed. 2nd, 934; Vines, et al., v. Serralles, 145 Fed. 2nd, 552 and Walling, Adm. v. Connecticut

Co. 154 Fed. 2nd, 552. Having tound and held that the faturing exemption ends when the tobacco reaches the receiving platforms of the packing bouse, it is unnecessary to consider the relative scope and effect of Clauses (6) and (10) of Section 213(a) of the Act in this case.

May Tobacco Company Case.

The Mays Tobacco Company case is in every respect similar to that of the King Edward Tobacco Company case. The May Tobacco Company grew 90 acres of Type 62 shade leaf tobacco in 1950 and orocessed in its packing house tobacco grown exclusively by it. For the reasons stated above the reference to the application of the Fair Labor Standards Act to the King Edward Tobacco 107. Company the Court finds and holds that the packing house

operations of the May Tobacco Company are also subject to

An appropriate judgment wilk be entered in the Budd Case, the King Edward Case and the May case in conformity with this Memorandum Decision,

What the Court has held in the Buck case, the King Edward Case and the May Case is equally applicable to each of the other cases pending before the Court and upon plaintin filing a motion for summary judgment in each case a short memorandum decision, referring to the decision in these cases, will be filed in those cases and a final judgment entered in each case accordingly.

Dated at Fallshassee, Fiorida, this 29th day of September, 1953.

(S.) DOZIER A DEVANE.
Linited States District Judge

in United States District Count

DEFENDANT'S MOTION TO REVISE STATEMENT OF FACES CONTAINED IN MEMORANDEN DECISION | Filed, November 14, 1953

Comes now the detendant King Edward Tobageo Company of
Florida and moves the Court to revise the Statement of
108 Facts contained in Memorandomy Decision dated herein Septables 29, 1953, in the following particulars

1 cm. Page 4 delete the sentence. This drying process is respected until the tebacco has reached a stage in the process of curing when it is ready for the packing house; and substitute in lieuthereof.—This drying process is continued until the tobacco is

moved from the barn to a packing plant", or words to the same general effect.

2. On page 6 delete the sentence. When the tobacco reached the stage in the process of enring, when it was ready for the packing bouse, the Kine Edward Tobacco Company took it to one of its packing houses where no other tobacco was processed and made ready for market, and substitute in lieu thereof.— When the tobacco is moved from the barne it is taken to one of the packing plants of King Edward Tobacco Company in which the tobacco of no other grower is hamiled, or words to the same general effect.

And as grounds of this motion the defendant would show that it does not appear from the affidavits or other evidence that tobacco "reaches a stage" or that it has to reach any particular "stage" at which it is moved from the barn to the packing plant:

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And Defendant further moves the Court to delete the words. The packing bouses are compped with machinery for the appropriate humidification and curing of the tobacco", appearing at the 109—bottom of page 4 and top of page 5; upon the ground that there is no evidence or showing that such packing plants are equipped with machinery.

III

And defendant further moves the Court to delete the words appearing near the bottom of page 6, "and defendant concedes that these packing house operations are subject to the Act"; upon the ground that the affidavits or evidence herein do not now show that the defendant "concedes" or admits that such operations "are subject to the Act", but such evidence shows, at most that the defendant is not in violation of the Act at such other packing houses.

11

And defendant further moves the Court to add to the paragraph ending near the middle of page 5, in the paragraph ending near the middle of page 5, immediately preceding the heading. The Budd Case the following sentence: 'A majority of the employees who work on tobacco in the packing plant also work part of the time on the tobacco tarms."

1

And defendant further moves the Court to receive and consider the additional affidavit of Robert F. Gardner tendered herewith and to modify the memorandum decision by incorporating therein a finding based upon such additional affidavit. And for grounds of this motion defendant would show the Court that such ad-110 ditional fact is not "new", or an afterthought, but was previewely disclosed to the Court in the defendant's "columnar chart" copies of which were delivered to the Court and plaintiff's counsel at the oral arminest such pre-thal conference June 30, 1953.

they Met and in

423 Atlanta, National Bank Bldg Jacksonville, Physika,

RICHARD J. CANDNER. Attorneys for Defendant

Quiney, Florida.

Apendavit of Robert F. Gardane Filed November 11, 1953; State of Florida,

County of Gastsden:

Robert F. Gardner, being first duly sworn, deposes and says: . .

I am a resident of the Toxb of Quincy, Gadsden County, Florida, and I am cuployed in a supervisory capacity by The King Edward Tobacco Company of Florida, a Florida corporation.

That or 21 October 32.3, which is the height of the packing season of the Type 62 cigar leaf wrapper tobacco, a survey was made of the employees of The King Edward Tobacco Company of Florida present on that date in and about its tobacco packing plant known as pecking home #1, located at Quincy, Florida; such enfoloyees then being engaged in the bulking, sorting handling and baling of the said tobacco.

The survey revealed that 83 of the 93 employees present had either worked continuously, with this tobacco or with other Type 62 tobacco from the time of the planting until the date of the survey including participation in the growing and Parvesting and the barn curines of such tobacco.

ROBERT F. GARDNER

Sworts to and sufferibed before me this 13th day of November, 1953

ALICE B. MICCHELL.

(Sea)). Notary Public, State of Florida at Large

My commission expire. May 9, 1955.

In United States District Count

PLAINTHY OMOTION FOR SUMMARY JUDGMENT AGAINST INTERVENER May Toracco Company - Filed November 30, 1953

Comes now the plaintiff by his attorneys and hereby moves the Court to enter judgment for the plaintiff again t May Tobacco Company; intervener, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on the ground that the pleadings, affidawits and all other documents and papers filed in this cause and all the proceedings heretofore had herein, together with the stipulation attached hereto, and hereby made a part hereof, show that there

is no genume issue as to any material fact and the plaintiff is certified to indement as a matter of law

IS I STUART ROTHMAN.

Solicitor.

(S.) BEVERLEY R: WORRELL,

Regional Attorney.

(S.) H. GRADY KIRVEN.

Attorney, United States Department of Labor.

Attorneys for Plainty

ertificate of Service omitted.)

In United States District Court

STIPLLATION OF FACTS Filed November 30, 1953 . :

Comes now the plaintiff and the intervener by their respective attorneys and fer purposes of this action stipulate and agree as follows:

I. That, during the period of time involved in this getion the fatervener, May Tobacco Company, did employ, and is bundleying many of its employee's engaged in the handling of tebacco in and about its place of business located at Oniney. Florida at wage rates less than seventy-five (75) cents an hour

2. That the intervener, May Tobacco Company, has not. 113 during the period involved in this action, made, kept and preserved records of hours worked each workday and each workweek. for sich of its said employees as prescribed by the Regulations. Part 516. Title 29, Chapter V. Code of Federal Regulations, Part 516 issued by the Administrator of the Wage and Heur Division. United States Department of Labor, pursuant to the authority

vested in him by Section 11(c) of the Fair Labor Standards Act of 1938 as amended (Title 29, U.S.C., 211(c)).

3. That the intervener, May Tobacco Company, has, throughout the period involved in this action, regularly and customarily shapped, delivered and sold, tobacco so handled by its employees employed at rates of pay less than seventy-five (75) cents an hour with knowledge that shipment, delivery and sale of said tobacco in interstate commerce was intended.

(S.) STUART ROTHMAN.

Solicitor

(S.) Beverley R. Worrell.

Regional Attorney.

(S.) H. GRADY KIRVEN

Attorney, United States Department of Labor, Attorneys for Plaintin.

Messer & Whalis, Attorneys for Intervener, By (S.) Ben C. Whalis.

114 In United States District Court

Order for Substitution of Party Praintiff—Filed Nevember 30, 1953

It having been satisfactorily shown to this Court that James P. Mitchell is the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such Secretary of Labor, United States Department of Labor, he has succeeded to all of the rights, duties and prerogatives of Martin P. Durkin, heretofore appearing as the Secretary of Labor, United States Department of Labor, and the plaintiff in this cause, and it appearing that there is substantial need for continuing and maintaining the above entitled action it is, therefore, on niction of attorneys for plaintiff.

Ordered Adjudged and Decreed that the said James P. Mitchell, Secretary of Labor, United States Department of Labor, be, and be bereby is, substituted as plaintiff herein in the place, and stead of Martin P. Durkin, formerly Secretary of Labor, United States Department of Labor, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said James P. Mitchell, Secretary of Labor, United States Department of Labor.

Da d: November 30th, 1953.

Dozier A. Devane, United States District Judge.

Plaintiff moves for entry of the above order. 115

STUART ROTHMAN

BEVERLEY R. WORRELL,

Regional Attorney.

H. GRADY KIRVEN.

Attorney, United States Department of Labor.

Attorneys for Plaintit

Defendant consents to entry of the above order:

EDWARD McCARTHY; RICHARD J. GARDNER. Attorneys for Defendant, King Edward Tobacco Company of Florida MESSNER & WILLIS, By BEN C. WILLIS, .. Attorneys for Intervener.

In United States District Court 116

MOTION OF INTERVENER, MAY TOBACCO COMPANY, FOR SUMMARY JUDGMENT—December 8, 1953

Come's now the intervener May Tobacco Company, a corporation. by its attorneys and hereby moves the Court to enter summary judgment on the pleadings and affidavit, including the affidavit of Fred L. May, herewith submitted and attached hereto; and, for grounds of this motion the said intervener would show to the Court that there is no genuine issue as to any material fact and that the intervener is entitled to judgment as a matter of law.

. Dated this 8th day of December, 1953.

MESSER & WILLIAM By BEN C. WILLIS, Attorneys for the Inter-

403-5 Midvette-Moor Building,

Tallahassee, Florida.

I certify that two copies of the foregoing motion together with two copies of the Fred L. May affidavit therein mentioned were mailed this day to Beverley R. Worrell, Esquire, Regional Attorney, Department of Labor, 1908 Comer Building, Birmingham 3. Alabama.

Dated this 8th day of December, 1953.

BEN C. WILLIS. Defendant's Attorney.

· AFFIDAVET OF FRED L. MAY

STATEOF FLORIDA.

County of Gadsden:

Fred L. May, being first duly sworn, deposes and says:

I am a resident of the town of Quincy, Gadsden County, Florida, and am president of the May Tobacco Company, a Florida corporation, and actively engaged in its management. I have been engaged in the business of planting, raising, curing, warehousing, packing and selling cigar wrapper leaf tobacco for a period of 40 years.

The May Tobacco Company, a corporation of which I am president, is engaged in the business of planting, raising, harvesting, curing, warehousing and packing eigar wrapper leaf tobacco in Gadsden County, Florida. Now and at all times mentioned in the complaint and answer filed in this cause the said corporation has been continuously and actively engaged in farming operations and actively planting, cultivating, growing and harvesting tobacco on the fairns of this corporation in Gadsden County, Florida. The acreage of the said corporation's farms include about 2800 heres in the aggregate, including woodland, grazing land, and general farm land, and including an average of between 80 and 100 acres of cultivated tobacco under shade on which U.S. Type No. 62 tobacco is grown under muslin cloth or cheeseeleth.

118 U. S. Type. No. 62 Chacco, is used exclusively for eight wrappers. It is grown only in Gadsden, Leon and Madison Counties. Florida, and in Decatur and Grady Counties. Georgia, and nowhere else in the world unless in quantities that are incensequential. The crop is grown in fields which are completely covered and enclosed with a chee-scloth shade. The cost per acre of production, and the price per acre which the faring receives for his crop, are to my knowledge the highest of all agricultural crops produced in the United States, with the exception of other types of cigar wrapper tobacco grown in other sections of the country.

The May Tobacco Company referred to bereinalter as the defendant, of a and operates a tobacco packing plant which is so-cated at 194 East Washington Sirect in the City of Quiney, Florida, which is located within a distance of not exceeding ten miles from the detendant's farms on which U.S. Type No. 62 tobacco is grown. To this packing plant is brought the shade grown a right whapper leaf tobacco (Type No. 62) produced on said corporation's tarms in Gadsden County, Florida. No other tobacco except that produced on the detendant's farms is received at said packing plant; and it is only the detendant's own tobacco which is bulked and packed at said packing plant.

The handling of tobacco in the defendant's packing plant consists of receiving the tobacco from the curing barns on the farm and pil-

ing the tobacco leaf on the floor of the packing plant into piles or bulks, each containing between 3500 and 4500 pounds of tobacco and during the period of approximately 2 to 4 months that

from time to time, and re-piled or re-bulked, and in such re-bulking, the object is to take out the "hands" of tobacco from the middle of the bulk and place them on the outside, at the same time taking the hands" that were on the outside of the bulk and placing them in the interior of the bulk. Such re-bulking is for the purpose of aerating the leaf and preventing an excess heating or fermentation in the interior of the bulk, and to assure that the natural changes in the leaf, which are hereinafter described, will be as uniform as possible in all the leaves throughout the entire bulk.

After such bulking of the tobacco leaf, as hereinabove described, for during the latter stages of such bulking, the hands of tobacco are acrated and sprayed for the purpose of keeping the leaf suffi-

ciently moist to withstand handling.

When the bulk-sweating is completed and the temperature of the bulk ceases to rise, the bulk is taken down, and the tobacco leaves are sorted and graded by hand and re-bulked to dry out over a further period of from 2 to 4 months and are then baled in bundles or packages, unstemmed, for sale and shipment to the cigar manufacturer.

Except such employees of the corporation as are engaged part time in maintenance work in and about the building, and such as are engaged in administrative and clerical office work, all of the defendant's employees in said packing plant do not do any other

work than as hereinabove described while working in said packing plant. At the height of the packing season, the corporation employs approximately 70 persons in and about its

poration employs approximately 70 persons in and about its packing plant and approximately 90% of these employees live outside of the corporate limits of the City of Quiney and reside either on the farms of the May Tabacco Company located in Gadsden County, Florida, or on adjoining and nearby farm lands. These of planting, during the growing, harvesting and barn curing and in the packing plant where the curing of the tobacco continues until it is baled and ready for the market. During the season that said employees are engaged in work at said packing plant, it is the practice and custom of the May Tobacco Company to furnish transportation and to transfort said employees by automobile track from their homes on the farms aforesaid into the City of Quiney to work in said defendant's packing plant.

None of the tobacco leaf handled in or shipped from said packing plant is stemmed, cut, treated or processed otherwise than as ficrein described. In harve ting this type of tobacco, as each leaf reaches a certain state of majority on the stalk, it is picked or "primed", the lower leaves being first picked—perhaps two or three from each stalk; and this "priming" is repeated from 4 to 7 times on up the stalk as the tobaccopicaves mature. The leaves so picked are called first primings" or sand leaves, "second primings," third primings, and so on. At each priming the leaves are immediately taken into the enring barn located on the farm, strung and hung on sticks to dry. Although leaves of several different primings are hang

121 in the same barn at the same time, as each prining completely loses its green color and becomes a shade of brown, it is taken down, packed loosely in boxes and carried to the packing plant where it is placed in bulks on the floor of the packing plant. The transference from the curing basns to the bulks must be prompt, in order to avoid any harmful stoppage or acceleration of the intracellular changes that are continuously taking place within the leaf.

The entire process of the treatment or care of the leaf, from the time it is first hung in the tobacco barn after priming until time that the bulk sweating is completed, is one entire and continuous process of natural transformation within the leaf itself necessary to make the leaf in its raw and natural state fit for the only use for which it is produced. Such care of wrapper tobacco, as distinguished from filler and binder types of tobacco, is as necessary, or more necessary, for the purpose of assuring the desired rolor and general appearance than for the purpose of affecting its flavor or aroma. This continuous patural internal transformation is completed without the addition, application or use of any external catalyst or other chemical or artificial stimulation or processing. other than the control and regulate temperature. Atmospheric temperature is controlled in the curing barn, and the temperature of the bulks is controlled in the packing plant by taking down and rebuilding the bulks from time to the as herein explained. Such temperature control is necessary to prevent either an injurious acceleration or an injurius stoppage of the natural internal transformation of the leaf, which is a gradual and continuous process

mation of the leaf, which is a gradual and continuous process

122 of drying and exidation, accompanied by intra-cellular activ
ities of micro-organisms and of the internal organic chemicals
within the leaf.

The changes in the tobacco leaf which occur after the leaf is taken from the barn and put into the packing plant are such as could be allowed to continue, and would continue, if the leaf were left in the curing barn, if the barn had proper temperature and atmospheric control. There are not enough curing barns on the farm to accommodate or store all the tenacco that would have to be accumulated and stored during the entire period of time from the first harvesting or priming until the time that the bulk sweating is

completed and the tobacco teady for grading and packing. Moreover, the natural processes which continue through the period of bulk sweating in the packing plant would be too slow and would take too long if the tobacco leaf were left hanging in the curing barn on the farm; and such natural processes would not have a uniform result on all the tobacco leaves unless the temperature of bulks were watched and controlled by taking down and rebulking.

When the green leaf is primed on the farm and first hung in the curing barn its water content is 80% to 85%, and the initial stages of curing the leaf in the barn consist primarily of a natural and gradual drying of the leaf and the evaporation of the large excess of water which must be at such a rate and under such conditions as will not inpiriously interfere with the accompanying intra-cely hilar chemical transformations that take place contemporanced by and continuously throughout the entire cusing and bulk sweating process. The most obvious change which occurs in the leaf while undergoing barn curing is (I) the loss of water, which is reduced from 80% to 85% content to a moisture content of between 10% and 25%, and (2) the loss of its green color and A coloring of the leaf; but irrespective of the moment when the lost is removed from the curing barn into the packing plant it is impossible to say that what moment of time, or that at any perticular moment of time, those intra-cellular changes which are predominant during the barn-curing period cease and those intracellular changes which are predominant during the period of bulk sweating begin. In other words: the intra-cellular transformation which is predominant during the period of barn curing on the farm continues to take place after the leaf is moved juto the packing plant and the bulk sweating is begun; likewise, those intra-cellular transformations, which are predominant during the period of bulk sweating actually have their incipiency while the leaf is still hang-

Thus, for instance, the loss of moisture which is more rapid during the period of barn-curing on the farm continues throughout the period of bulk sweating in the packing plant although at a lower rate. And the coloring of the leaf which commences in the curing barn also continues during the period of bulk sweating, the leaf becoming a deeper green, red or brown. The most notable chemical changes in the consistency of the leaf are a decrease in make acid and nicotine content, which is continuous throughout the period of barn-curing and the period of bulk sweating; also a rise in the citric acid content during the period of barn-curing tollowed by a reduction of the citric acid content during the period of bath-curing tollowed by a reduction of the citric acid content during the period of bulk sweat-

ing in the curing barn on the farm.

ing. This latter change, first in the accumulation and then in the loss of citric acid, is not a sudden change, but gradual,

and is believed to be due, not to the fact that the lear is taken out of the curing barn and put into bulks in the packing plant dut ter the effect of other accompanying internal chemical changes and activities of intra-cellular micro-organisms.

During the period of bulk sweating the leaf undergoes a most noticeable fermentation caused by the activities of intra-schillar micro-organisms. Although most pronounced during the period to bulk sweating, fermentation actually begins during the time that the leaf is still hanging in the caring barn on the farm. The process of bulk sweating is not for the purpose of causing such fermentation, but for the purpose of controlling and regulating it so as not to injure the leaf or destroy its flavor, aroma, burning qualities or its important rolor and general appearance, and so as to assure that all the the leaves is an entire bulk will be affected uniformly and not haphazardly.

After the bulking process in the packing plant is completed; and before the leaf is graded and baled, the leaf is remoistened; being sprayed with a fine spray. This remoistening, or "kasing", as it is called, is not for the purpose of stimulating or affecting the process of fermentation, but is for the purpose of keeping the leaf soft and pliable enough to withstand necessary handling without breakage or infury.

the May Tobacco Company at said packing plant in the City of Quiney have averaged between \$300,000 and \$350,000 per year and the total 1952 tobacco crop harvested from the farms of the May Tobacco Company as aforesaid and bulked, sorted, baled and handled in the said packing plant was approximately 112,000 pounds green weight. That the May Tobacco Company has not at any time received into or handled at its said packing plant any tobacco except that produced by the corporation on its own farms.

(S.) Firib L. May

sworn to and subscribed before me this 7 day of December, A. D. 1953.

(S.) A. D. Macon, Notary Public, State of Florida at Large

My commission expires July 5, 1954.

In United States District Court

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REVISE STATES MENT OF FACTS CONTAINED IN MEMORANDUM DECISION—Filed December 14, 1953.

Comes now the plaintiff, by his attorneys, in response to defendant's motion to revise statement of facts contained in the 126 memorandum decision in this matter and moves that said motion be denied on the grounds that the Court's statement of facts is amply and fully supported by the evidence in this mat-

In responding more particularly to the points stated in defend-

I. Defendant moves to strike sentences on pages 4 and 6 of the Goult's incommandian decision which scate, in effect, that tobacce is cuted until it reaches "a stage in the process of curing when it is teady for the packing house" and when tobacco has reached the project "stage in the process of curing" it is taken from the ruping borns to the packing house. The grounds for the metion are staged to be that the evidence does not show that "tobacco reaches a stage or that it has to reach any particular stage" at which it is moved from the bach to the packing house.

The plaintiff would respectfully show that detendant attached to its motion for squamary judgment dated August 5, 1952. A saliday it of J. D. Vrieze, its general manager, beginning on page 5 or when the stages of curing the leaf in the barn, are stated.

2. Dischant further moves the Court to strike its finding that the packing houses are equipped with machinery for the appropriate hundralication and currie of the tabacco.

Plaintiff world respectfully show that on page 5 of his affidavit dated August 1, 1952. Mr. J. D. Vrieze states that final curing of

127 tanger (timperature and atmospheric control.). This containly mighted that such control is necessary and since tobacco as transferred to the packing house the packing house must have

the necessary equipment for temperature and atmospheric Smitol. More specifically, on page 12 of the adidayat of Roberts . Hese dated August 28, 1952, the controls and equipment necessary for bulk curing of tobacco are discussed in detail.

3. While it is true that the written record in this case contains no concessions by defendant as to the coverage of its warehouse. No. 2 and No. 3, it is the recollection of plaintiff's attorneys that such representations were made at one or more of the several retrial conferences had before this Court.

4. Plaintiff objects to desendant's statement that "a majority of the employees who work on tobacco in the packing plant also work part of the time on the tobacco farms" on the grounds that it is entirely immaterial and further that the record in this case contains no evidence to support such a statement. •

5. Plaintiff objects to the affidavit of Robert F Gardner teadered with defendant's motion on the grounds that it is minuterial .

STUART ROTHMAN.

BEVERLEY R. WORRELL. H CHADA KIRVEN.

PERINDIE'S MOTION TO MIEND CONCLUSIONS CONTAINED I

Comes now the plaintiff by his attorneys and moves the Court to amend its conclusions contained in the un negatidation decision dated September 29, 1953, by striking therefrom an ince 9 thereof the last sentence under subtitle The King Libeard Toligonale . . . pany case which reads. Having found and holt that the intring exemption ends when the tablecto reaches the receiving platform of the packing house, it is unnecessary to consider the inlative seen and effect of clauses on and (10) or Section 13 and it he Act in this case ", and substitute in liquid before, the following

land that section therefore has no application to the unmloyees where

and would climinate any possible uncertainly as to the Court's ruling in this matter.

Respectfully submitted.

STUART ROTHMAN:

BEVERLEY R WORRELL. Regional Attorney. H. GRADY KIRVEN,

· Atterneys for Plaintin

Certificate of Service (omitted in printing)

130 In United States District Court, in and for the Northern
District of Florida, Tallahassee Division.

· Case No. 305-T-Civ.

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPART-MENT OF LABOR, PLAINTILE

18.

JOSEPH T BUDD JR AND FLORENCE W. BUDD COMPARINERS, DELYS BUSINESS AS J. T. BUDD, JR. AND COMPANY, DEFENDANCE

Case No. 340-TaCay

MERTER P. DURKEN STREETARY OF LABOR PRATTER STATES DEPARTS
MENT OF LABOR PRAINTIES

Kors Christian Terreta Company of Figures, a Florida compons-

SUPPLEMENTAL MUNICIPAL THEORY AND UNDER ON MOTHORS IN HENCE PLANESTS CONTRING IN MEMORAND IN DICESSON HERO-TOFORE THERE AND ON PLANESTS AND DEED DANT'S MORBIN FOR SUMMARY JUDGMENT IN THE MAY CARE. THE DESCRIBE 17, 1953.

Defendant, King, Edward Tobacco Company, has filed incremed motion to revise certain statements of facts contained in the memorandom decayon herein, which will be considered and disposed or scription.

131 I. On page \$5 of the memorandum decision defendant tooves to delete the sentence. This drying process is appeared until the tobacco has reached a stage in the process of curing when it is ready for the packing house, and substitute in her thereof. This drying process is continued until the tobacco is moved from the barn to the typicking plant, or words to the same general effect.

The Court finds no appreciable difference in the meaning and effect of the language used in the memorandum decision and in the revision requested by counsel for defendant and the motion in this respect is denied.

2 Counsel for defendant also moves the Coost to delete from page =7 the following sentence, "When the tobacco reached the stage in the process of curing when it was ready for the packing house the King Edward Tobacco, Company took it to one of its packing houses where no other tobacco was processed and made ready for market", and substitute in lieu thereof, "When the tobacco is moved from the barn it is taken to one of the packing plants

of King Edward Tobacco Company in which the tobacco of no other grower is handled? or words to the same general effect.

The Court finds no factual difference in the meaning and effect of the language used in the memorandum decision and in the tevision requested by counsel for defendant. Each correctly state the facts but the Court will adhere to the language used in the memorandum elecision and the motion in this respect is also densed.

132 If Coursel for defendant further moves the Court to delete the words. The packing houses are equipped with machinary for the appropriate humidiffication and curing of the aphrecy's appearing on range ₹5, upon the ground there is no dyidence or showing that the packing plants are compared with machinery.

This statement may be accurate as to the case made out by King Edward. Tobacco Company, but upon the whole record by fore the Company and very definitely appears of that the machine that characters are represented in achieve the appropriate luminities of the arriver of the tobacco and no large I done to King Cle in Tobacco Company case by regaining this language in the planers. Tobacco Company case by regaining this language in the planers.

III Coursel-let defendant ingther moves the Course to able to words appreciate against the last out of page 27 at feature of all described and one cless that these packing pages operations are substituted to the Art's on the ground that the affidavite or explored facility of and substituted affidition for explored facility of that defendant compades against that such applications are subject to the Art's but such explored shows at must find the defendant as not in violation of the Art at such arbeit packing larges.

Obsciously in cases of this characters the Court has better being expressing in its own language what the facts in a case show. The facts in this case plearly established that defendent operates two other packing houses in the same area; that these packing houses are not involved in this litigation because they were a rind not to be in violation of the last terms.

be in violation of the Act. While the Court could have used some word more pleasing to defend at than concedes.

the effect would have been the same and for this reason the Court sees no necessity for among the memorandum decision as requested. The motion to delete is denied.

IV and V* Counsel for defendant further moves the Court to add to the paragraph ending on page #6, immediately preceding the heading, "The Budd Case", the following:

"A impority of the employees who work on tobacco in the back-

and in support thereof defendant has filed and requests the Court to receive and consider an affidavit of recent date filed herein

by Robert F. Gardner, which shows that on October 21, 1953 at the height of the packing season of type #62 eigar leaf wrapper tobacco, a survey was made of the employees of the King Edward Tobacco Company present and working on that date in and about the packing plant involved in this suit and that 83 of the 93 cmployers present had worked continuously with this type of tobacco on some tobacco farm from the time of planting until the state of survey, including participation in the growing harvesting and logn curing of such tobacto

, factors and this memorandam decision may be considered as

leading heretalore filed bearin by striking

and hold than the families exemption onds the tolucto gardles the receiving platforms of the packing house it is applicable to consider the relative scope and effect of Chap-o-William Section Block of the Astin this case Land substitute

The pararel form to which the jobneso years in the field has a bean substantically changed in the drying and referring process before it reaches detendant's plants. Operations in the bulking Louses constitute processing of a type not commerated in Section

The around assigned for the change is that the proposed language is anaply supported by the facts in this ease and would climbrate

The Court is not convinced that anyone will be conjused by the language used and further is unwilling to accept and approve the limited approach to the question at issue in this case suggested in the proposed language. Therefore, plaintiff's motion to amend is denied.

The May Tobacco Company Case. 135

When this case was presented to the Court, counsel for the parties and the Court were laboring under the impression that protions, for summary judgment had been filed by plaintiff and defendant, May Tobacco Company, but it developed subsequently

that neither plaintiff nor defendant had filed such motion. United has now filed a motion for summary judgment, with notice to the Court that no further hearing thereon is requested and the Court having considered said motions and being fully advised in the premises adheres to the decision heretofore renehed in the XIX. Terraceo Company case in its prior memoraridam decision and pursuant thereto it is

Ordered and Adjudged that intercener's motion to summary judgment be and the same is hereby domed.

It is further Ordered and Admidsed that plaintiff, making per substituty judgment against the May Telegro Company, married be and the same is largely granted.

Done and Ordered at Pallahussell, Florida, this 17th day of December, 1963

Poster A Divine

136 to United States District Court for the Nordistra Quarrent Vol. Florida Fallabasses Division

Ulvil Action No. 340

James H. Millerich Sterring in English Charles Charles Debug-

Keen Flow view Pointer of Company on Property v. Language Company,

Mys Tomoro Company, vermonators, have a from

Fixed Lineares at Piled Lening v. J. 1984.

The above styled cause came on toy hearing below and Court sitting without a jury on cross polynops for summary polynomial heretoriore filed by the respective parties. Upon consultations of the pleadings and the stipulations, affidivits and other evidence filed herein and this cause having been submitted to the Court on the entire record and the arguments and briefs of coursel for the respective parties, and findings of fact and conclusions of law having been made and filed herein.

Now, therefore, sufficient cause therefor appearing and upon the findings of fact and conclusions of law contained in the memorandum decision filed herein and dated September 29, 1953, as amended, it is

Ordered, Adjudged and Decreed that the defendants. King

Edward Tobacco Company of Florida, and May Tobacco 137 Company, their officers, agents, servants, employees, attorneys and all persons acting, or claiming to act, in their behalf and interest, be, and they hereby are, permanently enjoined and restrained from violating the provisions of Sections 15(a)(1), 15 (a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 as amended (Act of June 25, 1938, 52 Stat. 1060, as amended by 63 Stat. 919; U.S.C. Ti. 29, Sec. 201, et seq.), herein after the total as the Act, in any of the following manners:

(1) The defendants shall not contrary to Section 6.01 the Art, pay to any of their employees who are engaged in the production of goods for interstate commerce, as defined by the Act, wages at

rates less whan seventy-five (75) cents an hour

(2) The defendants shall not contrary to Section 15 and 15 of the Net ship, deliver, transport off or transportation of ship deliver to sell with knowledge that shipment, delivery or sale thereof in interstate constance is intended, any goods in the production of which are easy loves of the defendants has been employed at vates of pay less than those specified in paragraph (1) of this independ on the defendants shall not fail to make keep and preserve

The designants shall not fail to make keep and preserve regords of their employees and the wages hours and other conditions and practices of employment maintained by them as present at by the regulations of the Administrator issued, and from time to time amended, pursuant to Seption 11(r) of the Act and found in

Title 29, Chagger V. Code of Federal Regulations, Part of 6

138 It is further Ordered that nothing in this indement shall be construed to prevent the shipment delivery or side by defendants in interstate commerce of any goods which they now have on hand in the production of which any of their employees may have heretefore been quarloyed in violation of Section 6 of the Act

It is further Ordered that costs be, and they hereby are taxed

against the defendants for which execution may issue.

Dates this 30th day of December, 1953

Dozier A. DeVane, United States District Judge

In United States District Court for the Northern District of Florida Tallahassee Division

(Title Omitted)

NOTICE OF APPEAL -filed February 23, 1954

Notice is hereby given that King Edward Tobacco Company of Florida, a Florida corporation, defendant above named hereby

appeals to the United States Court of Appeals for the Fifth.

139 Circuit from the final judgment bearing date December 30, 1953, and entered in this action on January 4, 1954.

(S.) EDW. McCARTHY.

423 Atlantic National Bank Bldg., Jacksonville, Florida.

(S.) RICHARY J. GARDNER.

Quiney. Florida

Viornous for King Library Tobacco Company at Planda

Cartificate of service amount is

In United States District Court for the Northern District of Elevation Tellahussee Division

Title Omitted)

STREET APPRAISE filed Police ary 24, 1954

Notice is hereby given that May Deback Collinery is expensional intervener above almost breely appeals to the United 140. States Court 6. Appeals for the Eith Crema from 20, fould pudgment bearing date Decyclos 30, 1953, and tutered in this action on January 4, 1954.

Hyas Micross (The Suc.

1625 K Strget, N.W., Washington 6, D.C

Certificate of service control !

*Cost Bond in the sum of \$250.00 filed by King Edward Tobacco Company of Florida February 23, 1954, with St. Paul-Mercury Indomnity Company, a Delaware corporation, as Surety.

Cost Bond in the sum of \$250.00 filed by May Tobacco Company February 23, 1954, with St. Paul Mercury Indemnity Company, a Delaware corporation; as Surety. .141 In United States District Court

Motion to Stay Injunction Pending Appeal -Filed February 23 1954

Comes now the defendant King Edward Tobacco Company of Florida, having filed its notice of appeal to the Court of Appeals for the Fifth Circuit from the final judgment dated December 30, 1953, herein entered January 4, 1954, and moves the Court to stay the permanent injunction granted herein in and by said final judgment, pending the appeal herein from said final judgment.

Dated this 23rd day of February, 1954

EDW McCARTHY

423 Atlantic National Bank Bldg.
Jacksonville, Florida.

RICHARD J. GARDNER.

Quincy, Florida.

Attorneys for King Edward Tobacca Company of Florida.

142 In United States District Court

Motion to Stay Injunction Pending Append - Filed February 23

Comes now the intervener May Tobacco Company, having filed its notice of appeal to the Court of Appeals for the Fifth Circust from the final judgment dated December 30, 1953, herein outsted January 4, 1954, and moves the Court to stay the permanent injunction granted herein in and by said final judgment, pendings the appeal facient from said final judgment.

Dated this 23 day of February, 1954.

POOLE, SHROVER & DENBO, By (8.1 Million C. Denbo,

1625 K Street N.W., Washington, D.C.

> Attorneys for May Tobacco Company.

(Certificate of Service omitted.)

In United States District Court

Order Granting Motions to Stay Injunction Pending Appeal.

Filed February 23, 1954

This cause came on 3 be heard upon separate motions of the defendant King Edward Tobacco Company of Florida and of the intervener May Tobacco Company for an order staying the permanent injunction granted herein by final judgment of this Court dated December 30, 1953, herein entered January 4, 1954, during the pendency of appeal taken from said final judgment to the Court of Appeals for the Fifth Circuit, and good cause appearing therefor, it is

Indexed that a stay of said permanent injunction and final permanent is hereby allowed; without additional bond, during the pendency of said appeal.

Dated at Tallahassin, Florida, February, 23rd, 1954.

(S.) Doziek A. DeVast.
United States District July

144

In United States District Court

Notice Under Rule 75(n) FRCP-Filed F-bruary, 24, 1954

To Beverley R. Worrell, Esq.

Plaintin's Attorney

1908 Comer Building.

· Birmingham 3. Alabama

Milton C. Denber Esq.

Attorney for May Tobacco-Company:

1625 K Street, N.W.

Washington 6, D. C.

There is herewith served upon you, pursuant to Rule 75(n) of the Federal Rules of Civil Procedure, a proposed statement electrain facts and proceedings not stenographically reported, and you are hereby notified to serve your objections or proposed amendments thereto within ten (10) days after service upon you. Thereupon said statement, with such objections or proposed amends thereto as you may serve will be submitted to the said District Court for settlement and approval, in accordance with said Rule.

Copy of the "columnar chart" referred to in said proposed

statement is not attached, having already been delivered to you June 30, 1953, at Tallahassee.

Dated this 23rd day of February, 1954.

· Ed. McCarthy.

423 Atlantic National Bank Bldg., Jacksonville 2, Fla.

RICHARD J. GARDNER:

Quincy, Florida.

Attorneys for Defendant King Edward Tobacco Company of Florida.

145 State of Florida, County of Dural.

Edward McCarthy, being first duly sworn, deposes and says, that on February 23rd, 1954, he mailed a true copy of the foregoing notice, and statement of facts thereto attached, to Beyerley, P. Worreff, Esq., plaintiff's attorney, 1908, Comer Building, Birnfingham, Alabama, and to Milton C. Denbo, Esq., Attorney for May Tobacco, Company, 1625 K Street, N.W., Washington 6, D. C.

EDW. MCCARTHY

Sworn to and subscribed before me this February 23, 1954.
Bettie Zoere.

(Scal)

Notary Public. State of Florida at large,

My commission expires Jan. 40, 1955.

PROPOSED STATEMENT OF CERTMIN FACTS AND PROCEEDINGS YOU STENOGRAPHICALLY REPORTED

The Pre-trial Conference and hearing on the Motion of May Tobacco Company to intervene, noticed for December 10, 1952, was re-set by the Court for December 17, 1952, at Tallahassee. At such hearing on December 17, 1952, the Court granted the motion to intervene, and suggested to Plaintiff's counsel that all other tobacco packing plants in Gadsden County, Florida.

146 which were not then in compliance with the Fair Labor Standards Act, be brought into Court, either in the causes then pending or in separate suits, and announced that the pre-trul conference would be deferred until such time as such other packing plants were before the Court.

Thereafter, and after Plaintiff had filed separate suits against nine other Defendants and after answers were filed by all such Defendants, the Court by letter lo counsel set a pre-trial conference in all eleven cases for June 30, 1953, at Tallabassee.

At such conference on June 30, 1953, Defendants' counsel presented to and filed with the Court as an Exhibit a columnar chart, which is hereto attached and made a part hereof. Instead of proceeding with the prestrial conference, the Court suggested that all parties in the Budd Case (No. 305) and the King Edward Case (No. 340), including the Intervener May Tobacco Company file motions for summary judgment, saying that the other time case would be held in abeyance until such motions should be disposed of

On December 17, 1953, by letter to Defendants' Counsel, the Court stated that it was the Court's intention to enter final judgments only in the Budd, King Edward and May Cases Sand leave all the other cases pending until the Court of Appeals disposed of the Budd, King Edward and May Cases.

147 Served by usual February 23rd, 1954

Eps McCarin

123 Atlantic National Bank Building

Jacksonville 2. Fla

RICHARD J. GARDNER.

Attorney's for Kings Edward.

Tobeless Company of Florid

Quincy, Florida;

(Here follows 1 Photolithograph, side folio 148)

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Plaintiff's Objections to Defendant's Proposed Statement of Facts Under Rule 75(n), Federal Rules of Civil Procedure—Filed March 5, 1954.

Comes now the plaintiff by his attorneys and objects to defendants' proposed "Statement of Certain Facts and Proceedings not Stenographically Reported" on the following grounds that:

- (1) Defendants' proposed statement of facts and exhibit attached thereto do not pertain to evidence or proceedings at a trial or hearing within the meaning of Rule 75 (n), Federal Rules of Civil Procedure.
- (2) Defendants' proposed statement of facts and exhibit attached thereto are not, and never have been, any part of the record in this case stenograpically unreported or otherwise and they are, therefore, not properly subject to consideration under Rule 75(n) of the Federal Rules of Civil Procedure.
- (3) Defendants' proposed statement of facts, and particularly the exhibit attached thereto, are inadmissible by reason of incompetency, immateriality and irrelevancy.
- (4) Defendants' proposed statement of facts is inaccurate insofar as it states an Exhibit, a "columnar chart", was filed with the Court.
- and represented to be a summary of the status of the various parties pending before the Court but that it was not filed or offered as a part of the record as indeed it could not have been.

Now, Therefore, plaintiff moves that his objections be sustained and defendants' motion be denied.

STUART ROTHMAN,

Solicitor.

Beverley R. Worrell,
Regional Attorney,
Norman H.-Winston,
Attorney,
United States Department of Labor,
Attorneys for Plaintiff.

Certificate of Service (omitted in printing)

151 In United States District Court

STATEMENT OF CERTAIN FACTS AND PROCEEDINGS NOT STENOGRAPH-ICALLY REPORTED—Filed February 24, 1954

The Pre-trial Conference and hearing on the motion of May Tobacco Company to intervehe, noticed for December 10, 1952, was re-set by the Court for December 17, 1952, at Tallahassee. At such hearing on December 17, 1952, the Court granted the motion to intervene, and suggested to plaintiff's counsel that all other tobacco packing plants in Gadsden County, Florida, which were not then in compliance with the Fair Labor Standards Act, be brought into Court, either in the causes then pending or in separate suits, and announced that the pre-trial conference would be deferred until such time as such other packing plants were before the Court.

Thereafter, and after plaintiff had filed separate suits against nine other defendants, and after answers were filed by all such defendants, the Court by letter to counsel set a pre-trial conference in all eleven cases for June 30, 1953, at Tallahassee.

At such conference on June 30, 1953, defendants' counsel presented to and filed with the Court as an exhibit a "columnar chart", *

which is hereto attached and made a part hereof. At the conclusion of the pre-trial conference, the Court suggested that all parties in the Budd Case (No. 305) and the King Edward Case (No. 340), including the Intervener May Tobacco Company, file motions for summary judgment, saying that the other nine cases would be held in abeyance until such motions should be disposed of. This was promptly done by all parties in these cases.

On December 17, 1953, by letter to defendants' counsel, the Court stated that it was the Court's intention to enter final judgments only in the Budd, King Edward and May Cases, and leave all the other cases pending until the Court of Appeals disposed of the Budd, King Edward and May Cases.

Served by mail February 23rd, 1954.

(S.) EDW. McCARTHY.

423 Atlantic National Bank Bldg., Jacksonville, Fla.

(S.) RICHARD J. GARDNER.

Quincy. Fla.

Attorneys for King Edward Tobacco Company of Florida.

(Changes shown (on original) in handwriting made by the Court.
(S.) Dozier A. DeVane.

Judge. ·

^{*}Columnar chart not reproduced here is the columnar chart filed.

February 24, 1954.

153 In United State's District Court

ORDER OF COURT APPROVING REVISED STATEMENT OF CERTAIN FACTS AND PROCEEDINGS NOT STENOGRAPHICALLY REPORTED Filed March 19, 1954

This matter came on for hearing before the Court en Notice under Rule (75(n)) of the Federal Rules of Civil Procedure for approval of a proposed statement of certain facts and proceedings not stenographically reported, and the Court having considered the same and objections filed by counsel for plaintiff thereto, has modified, in its own handwriting, such changes as should be made in the statement and as modified said statement is hereby approved.

Done and Ordered at Tallahassee, Florida, this 19th day of March, 1954.

Dozier A. DeVane, United States District Judge.

154-158 Appellant's Designation of Record Proceedings and Evidence to be Included in Record on Appeal (omitted in printing)

159 Designation by Appellant, May Tobacco Company, of Record, Proceedings, and Evidence to be Included in Record on Appeal, (omitted in printing) 160 In United States District Court

MOTION FOR EXTENSION OF TIME TO FILE RECORD ON APPEAL-

Filed March 23, 1954

Come now the defendant King Edward Tobacco Company of Florida, a Florida corporation, and the intervener May Tobacco Company, a corporation, by their respective undersigned counsel, and show to the Court that additional time is needed within which to prepare and file the record on appeal herein to the United States Court of Appeals for the Fifth Circuit from the final judgment bearing date December 30, 1953, and entered in this action on January 4, 1954.

Wherefore, said defendant and said intervener jointly pray for an extension of fifty (50) days from and after April 4, 1954, within which to prepare and file said record on appeal.

Dated this March 20, 1954.

EDW. McCarthy,

423 Atlantic National Bank Building, Jacksonville 2, Florida.

Quincy, Florida.

162

1625 K Street, North West, Washington 6, D. C.

RICHARD J. GARDNER,
Attorneys for King Edward
Tobacco Company of Florida,
MILTON C. DENBO,
Attorney for Intervener
May Tobacco Company.

In United States District Court

ORDER EXTENDING TIME TO FILE RECORD ON APPEAL—Filed March 23, 1954

The joint motion of the defendant King Edward Tobacco Company of Florida and the intervener May Tobacco Company to extend the time within which to file record on appeal in the above entitled cause to the United States Court of Appeals for the Fifth Circuit from the final judgment bearing date December 30, 1953, and entered in this action on January 4, 1954, is hereby granted, and it is

Ordered that the time within which to file the record on appeal in the above entitled cause be, and the same is hereby, extended to and including the 24th day of May, 1954. Copy of said joint motion and of this order shall be included in said record on appeal. Done and Ordered at Tallahassee in the District aforesaid this 23rd day of March, A. D. 1954.

Dozier A. DeVane:
United States District Judge.

- *163-164 Clerk's Certificate to foregoing transcript omitted in printing.
- 165 MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 31,

(omitted in printing)

166 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15016

Joseph T. Budd, Jr., and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr. and Company, appellants

versus

James P. Mitchell. Secretary of Labor, United States Department of Labor, appellee

and

· No. 15071

King Edward Tobacco Comeany of Florida and May Tobacco Company, Intervenor, appellants

versus

James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellee

Appeals from the United States District Court for the Northern District of Florida

Opinion-April 15, 1955

167 Before HUTCHESON, Chief Judge, and RIVES and TUTTLE.
Circuit Judges.

RIVES, Circuit Judge: The opinion of the district Court in these cases is reported at 114 F. Supp. 865. The Budd case was the action first brought by the Secretary of Labor under Section 17 of the

Fair Labor Standards Act 1 to enjoin the Budds from violating the minimum wage and record keeping provisions of the Act. At the conclusion of a prestrial conference on that case, the district court was of the opinion that the Budd company operation was in violation of the Act, but, in order to avoid putting the small farmers, whose tobacco was processed by the Budds, at an economic disadvantage to the operators who processed their own tobacco exclusively, the court insisted that before decision in the Budd case, the issues be broadened to include such large operations. Accordingly, suit was brought against the King Edward Company and the May Company intervened.

The cases involve the definition of "Agriculture" under Title 23 U.S.C.A. Section 203(f), the agricultural exemptions under Section 213(a), clauses 6 and 10, and incidentally the exemption 168 from the maximum hours provision under Section 207(c).

other dairy products; *

⁴ Act of June 25, 1938, c. 676, 52 Star, 1060, 29 U.S.C.A. 201, et seq., as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910.

^{2&}quot; (f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and barvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock; bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

^{3 &}quot;§213. Exemptions

apply with respect to * * * (6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; * * * (10) any individual employed within the area of production tas defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw is natural state, or canning of agricultural or horticultural commodities for market, or in making cheese of butter or

^{4 &}quot;\$ 207 Maximum hours"

of milk, buttermilk, whey, skingmed milk, or cream into dairy

All, of appellant's processing operations are in connection, with U.S. Type 62 Sumatra tobacco, which is a leas tobacco grown and used entirely for cigar wrappers. This type of tobacco is new receively in three counties in North Florida, and two counties in South Georgia contiguous to two of said Florida counties. Most of such tobacco is grown within an airline radius of thirty miles of Quincy, the County Seat of Gadsden County, Florida.

We quote from the opinion of the district court:

"Method of Growing, Harvesting and Marketing Type 62 Shade Leaf Tobacco

"Type 62 shade leaf tobacco requires special and painstaking cultivation, harvesting, curing and preparation for market. It grows in fields inclosed in a chee-ecloth shade, which 169completely covers and incloses the tobacco field. regular intervals through the fields. It is highly fertilized and intensively cultivated charing the growing period. When each leaf reaches a certain stage of hasturity it is promptly harvested. This harvesting process is known as 'priming'. 'The lower leaves are picked first, perhaps not more than two or three from each stalk. This picking is repeated as the tobacco matures on up the stall, until all the marketable leave have been removed. At each priming the tobacco is immediately taken to a tobacco barn located on the farm where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried the drying process is interrupted and it is permitted to absorb moisture and again dried. This drying process is repeated until the tobacco has reached

products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugarbeet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) of this title shall not apply to his employees in any place of employment where he is so engaged, and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fiesh fruits or vegetables, or in the first processing, within the larea of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing politry or livestock, the provisions of subsection (a) of this title, during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place aftemployment where he is so engaged.

a stage in the process of curing when it is ready for the pack-ing house.

"It is then taken from the barns in the field, placed in appropriate containers and carried to the packing house where it is placed in piles known as bulks, for curing. Each bulk consists of more than 3000 lbs, of tobacco. The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco. During the curing period the temperature within each bulk is closely watched from day to day and at regular intervals, when the appropriate time has arrived, the bulk is broken up, the tobacco leaves shaken out and those on the outside placed on the inside of the new bulk and those on the inside placed on the outside for further curing.

This process is continued until the tobacco is ready for market when it is bailed (sic) for shipment." Durkin v. Budd, 114 F. Supp. 865, 866-867.

After such processing, this type tobacco falls into eight main classifications, and none of those classifications can be determined prior to the processing. Primarily, because it cannot be graded until it has been processed, there is no market at an earlier stage for this type tobacco. The market variation dependent upon grading is considerable, ranging from a high of approximately \$2.40 per pound down to as low as \$40 per pound.

Some 300 farmers in the Quincy area grow this type of tobacco with about 80% growing and harvesting less than 25 acres per year, and a majority producing only 1-12 to 10 acres per year. As has been noted, the natural heating, fermentation, and curing of this tobacco requires bulks of more than 3000 lbs, of tobacco. The small farmers do not grow the tobacco in such quantities, and, hence, cannot process their own tobacco. For the year 1950, some 52 et such small farmers cultivating a total of 263 acres had their tobacco processed by the Budd Company. That company grows no tobacco of its own but processes tobacco grown by others.

During 1950, the King Edward Tobacco Company cultivated 206 acres, and the May Company 90 acres of this type tobacco, and those two companies processed their own tobacco, and did not handle the tobacco of any other person at the packing houses here involved. Those packing houses are located in the town of Quincy.

which, according to the 1950 census had a population of 171—6.586, and the Budds, packing house is also in that town—M the height of the packing season, May employs approximately 70 employees in its packing plant. King Edward some 120 employees and Budd approximately 108 employees. The majority of all such employees work also on the farms when not engaged in

work at the packing plants. Other pertinent facts appear in the opinion of the district court:

King Edward and May claim that their employees are exempt from the provisions of the Act under Section 213(a)(6) because they are employed in agriculture. As to King Edward and May, the appellee concedes that:

"Appellants are admittedly farmers in their growing operations, and admittedly the mere fact that they are large crowers does not affect the availability of the exemption to them insofar as they are in fact farmers." But obviously appellants are also something else in addition to being growers—they are also operating separate and extensive commercial enterprises, of the same character as similar independently owned and operated packing houses."

The district court held "that upon the record in this case the farming exemption ends when the tobacco reaches the receiving platform of the packing house." * "." * 114 F. Supp. 868. We cannot agree. It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the mar-

keting of their crops, and that the work of their packing house employees, in the preparation for market of the leaf

grown exclusively on their farms, constitutes "practices performed by a farmer as an incident to or in conjunction with such farming operations, including preparation for market," within the meaning of Section 203(f) 6

All of the appellants claim that their employees are exempt from the Act by virtue of Section 213(a)(10) [see footnote 3, supra], because their operations are one of those enumerated in that section and necessary for the marketing of their crops, and because the Administrator exceeded his authority in excluding from the "area of production", "any city, town or urban place of 2:500 or greater population." Appellee concedes, as it must, that this Circuit has already held that the Administrator did so exceed his authority?

^{See Addison v. Holly Hill Fruit Products Co., Inc., 332 U.S. 607, 614, 615; N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 2d 184, 187; Waialua Agricultural Co. v. Maneja, 9th Cir., 216 F. 2d 466, 474, 475.}

See Farmers Irrigation Co. v. McComb, 337 U.S. 755; Addison v. Holly Hill Fruit Products Co., Inc., 322 U.S. 607; N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 2d. 184, 187; Waiabia Agricultural Co. v. Maneja, 9th Cir., 216 F. 2d. 466; American Sumatra Tobacco Corp. v. Tone, (Conn.) 15 Atl. 2nd. 80.

Jenkins v. Dürkin, 5th Cir.; 208 F. 2d. 941; Lovvorn v. Millet, 5th Cir., 215 F. 2d. 601. Cf. Tobin v. Traders Compress Co., 10th

Appellee insists, however, that after it reached the packing house, the tobacco was no longer an "agricultural or horticultural continuodity", and that the processing operation was not one of the enumerated in the section. The legislative history of Section 213(a)(10) makes clear that its primary purpose was to prevent discrimination against the small farmer. When it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the

Cir., 199 F. 2d. 8. It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case.

"Mr. Schwellenbach——If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central wavehouse, of who may join with others in a cooperative warehouse, and there have the same processes performed."—81 Cong. Rec. 7659.

"But it seems that, so long as they remain in their natural state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered together in a cooperative, or turned over to a central warehouse, they should be exempt, because of the fact that if we do not exempt them, we are giving the large producer a very distinct advantage over the small producer, and I am certain that it is not the purpose of the bill and is not within the economic theory of the bill to give the large producer an advantage over the small producer." (Emphasis supplied.) 81 Cong. Rec. 7660.

"Mr. Schwellenbach. The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature," * * *. In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to storethe apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing house, and have these operations, which are purely agricultural operations performed elsewhere than at the situation the ranch or the farm.

The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable

employees of all of the appellants are exempt under Section 213 (a) (10). Since we are of the opinion that the employees are exempt under Section 213 (a) (10), we do not feel called upon to

tion in that section and of the partial exemption in Section 207 (c) further than to say that we agree with the Ninth Circuit that such exemptions overlap and are not alternative or mutually exclusive. Wakibua Agricultural Co. v. Maneja, 9th Cir., 178 F. 2d. 603, 609.

Appellee jasists, however, that Section 213 (a) (10) is inoperative until the Administrator makes a valid definition of the area of production. That much may be granted, but in a case like this, otherwise within the exemption, and which might likely fall with a valid definition of the area of production, the appellee is in no position to seek the equitable remedy of injunction until such definition has been made.¹⁹

The judgments are, therefore, reversed and the causes remanded with directions to enter judgments for the defendants, and for the intervenor, May Company.

Reversed and remanded with directions.

producer to operate upon the same basis as the large fruit and vegetable producer." (Emphasis supplied.), 81 Cong. Rec. 7876.

"In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill." 81 Cong. Rec. 7877.

The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own warehouses and their own washing machines, and their own equipment." (Emphasis supplied). 81 Cong. Rec. 7877.

See also, the dissenting opinion in Addison v. Holly Hill Co., 322 U.S. 607, at p. 633.

See Fleming v. Farmers Peanut Co., 5th Cir., 128 F. 2d. 404;
et Puerto Rico Tobacco Marketing Coop. Ass'n v. McComb. 1st
Cir., 181 F. 2d. 697

¹⁰ See Messenger v. Traders Compress Co., D.C. E. Dist Okla., 107 F. Supp. 354, 360; Walling v. McCracken County Peach Growers Ass'n, D.C. W. Dist. Ky. 50 F. Supp. 900, 905, 906.

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175

In United States Court of Appeals

No: 15071

King Edward Tobacco Company of Florida and May Tobacco Company, Intervenor

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPART-MENT OF LABOR

JUDGMENT-April 15, 1955

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendant, and for the intervenor, May Company.

176 Clerk's Certificate to foregoing transcript omitted in printing.

177-178 Supreme Court of the United States

No.——, October Term, 1955

[Title omitted]

ORDER EXTENDING TIMESTO FILE PETITION FOR WRIT OF CERTIORARI

'Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 1, 1955.

Associate Justice of the Supreme Court of the United States.

Dated this 8th day of July, 1955.

179

Supreme Court of the United States

No.* 278, October Term, 1955

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 17, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIETARY

JUL 2 1 1055

HABOLA & TVILLEY, Clark

Inthe Angreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD,
CO-PARTNERS, DOING BUSINESS AS J. T. BUDD,
JR., AND COMPANY

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, RETURNER

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF AFPEALS FOR THE PIFTH CHECUIT

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INDEX	
	lad!
Optitions below	
Jurisdiction	2
Questions presented	. 2
Statute involved	3
Statement	3
Reasons for granting the writs	10
Conclusion	29
Appendix A	33
Appendix B	44
CITATIONS	
Cases: (3	
Addison v. Holly, Hall Co., 322 U.S. 607,	
11, 12, 14, 15, 16, 17, 18	. 20
Abstate Construction Co. v. Durkin, 345 U.S. 43	21
Bowie v. Gonzalez, 117 F. 2d 11	27
Fleming v. Farmers Pranut Co., 128 F. 2d 404	17
Jenkens v Ducklin, 208 F 2d 941	
E. Lovvorn's Miller, 215 Fs 2d, 601	14
Maneja v Waialaa Agricultural Company, 349	1.1
U.S. 254	oe
Paerto Rico Tobacco Marketini Coop. Ass'n v.	-211
Oracle to the analysis	00
	26
Stratton v. Farmers Produce Co., 134 F. 2d 825	27
: Tobin v. Traders Compacy, Company, 199 F. 2d 8.	
certiorari denied, 344 U.S. 909, rehearing denied,	-
344 U.S. 931	17
Wyatt v. Holtville Alfalfa Mills, 106 F. Supp. 624.	26
Statutes	
Fair Labor Standards Act of 1938, as amended,	
e 676, 52 Stat. 1060; c. 736, 63 Stat. 910 129	
USC 201), et seq.	
Sec 3(1)	11
7(c) 11, 15, 26-28,	44

274		
Statutes-	Cont	inned

. 20	atutes - Continued	Page
	13(a)(6)	45
		28, 45,
	Fair Labor Standards Amendments of 1949, 63	
	Stat 910, Sec. 1607	21 29
	Portal-to-Portal Act of 1947, 29 U.S.C. 25f. 261;	
	Sec. 12 - 3	24.
M	liscellaneoes,	
	1948 Annual Report of the Wage and Hour and	. 10
	Public Contracts Divisions, pp. 123-134	. 19
	1950 Annual Report of the Societary of Labor, pp.	
	281-285	19
	29 CFR; Ch. V., § 536-2 (Federal Register, Decem-	
	ber 25, 1946, 11 F. R. 19648, 13 F. R. 73474 - 🖎	
	3 CCH Labor Law Reporter, par. 23,282	12
	81 Cong. Rec. 7877-7878	25
	95 Ceng. Rec. 12435-12436	20
	[©] 95 Cong. Rec. 14933	20
	Hearings before the Committee on Education and	
	Labor on H. R. 2033, Sist Cong., 4st Sess.	
	(1949), Vol. 1:	
	p. 56 \$, 20
	рр: 872-887, 912-945	19
	Hearings before Subcommittee No. 2 of the Comp	
	mittee on the Judiciary, House of Representa-	
	tives, 80th Cong., 1st Sess., on H. R. 584 and	*
	H. J. Res. 91, pp. 210-221	20
	Hearings before a Subcommittee of the Committee	•
	on Labor and Public Welfare on S. 58, S. 57,	
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	Cong., 1st Sess. (1949), pp. 658-705,	. 19
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In the Supreme Court of the Elnited States

October Term, 1955.

No.

James P. Mitchell, Secretary of Labor, United States Department of Labor, petitioner

CO-PARTNERS, DOING BUSINESS AS J. T. HODD,
JR., AND COMPANY

James P. Mitchell, Secretary of Labor, United States Department of Labor, petitioner

KING EDWARD TOBACCO COMPANY OF FLORIDA AND
MAY TOBACCO COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cases on April 15, 1955.

The opinion of the District Court (RK 97, RB 212) is reported at 114 F. Supp. 865. The opinion of the Court of Appeals (App. A. intra. pp. 33.41) is reported at 221 F. 2d 406.

JURISDICTION

The judgments of the Court of Appeals (App. A, infra, pp. 42-43) were entered on April 15, 1955. By order of Mr. Justice Black, dated July 8, 1955, the time for diling a petition for a writ of cornorari was extended to and including August 1, 1955 (App. A, infra, p. 43). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

- 1. Whether off-the-farm employees of respondents' tobacco bulking plants—one of which (Budd) processes tobacco grown by numerous small farmers while the other two (King Edwards and May) process only tobacco grown by the processor—are employed in "agriculture" within the emeaning of Section 3(f) of the Fair Labor Standards Act, and are therefore exempted by Section 13(a)(6) from the minimum wage and overtime provisions of the Act.
 - 2. Whether employees of tobacco bulking plants are engaged in any of the enumerated operations on "agricultural or horticultural commodities" within the terms of the exemption provided by Section 13 (a) (10) of the Act.

^{&#}x27;RB' references are to the record in Rudd white 'RK' references are to the record in King Edward.

3. Whether the regulation of the Administrator of the Wage and Hour Division, defining "area of production" parsuant to Section 13(a) (10) of the Act, is valid.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, a amended d. 736, 63 Stat. 910 (29 U.S.C. 201, et s.g.), and the pertinent administrative regulations 20 CFR. Ch. V. 536.2 and administrative findings are set forth in Appendix B, infra, pp. 44-70.

STATEMENT

These actions were brought by the Secretary of Labor under Section 17 of the Fair Labor Stand ands. Act to enjoin respondents from violating the minimum wage and record keeping provisions of the Act. The employees involved work in tobacco bulking or processing plants operated by the three respondents in the town of Quincy, Florida (RB 1-2, 6, 212; RK , 6, 69), and respondents claim that these caployees are exempted from the wage provisions of the Act.

to U.S. Type 62 Sumatra tobacco which is a leafto U.S. Type 62 Sumatra tobacco which is a leaftobacco grown and used exclusively for eight wrappers (RB 71, S3; RK 11). Type 62 requires a special kind of cultivation, and curing (RR 71-72, 100; RK 11-17). It is grown in fields completely enclosed and covered with cheesecloth shade. When each leaf of tobacco reaches a certain state of maturity it must immediately be

harvested through a process known as priming. The lower leaves are picked first, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures until the operation has been repeated six or seven times. At each priming, the tobacco is immediately taken into a tobacco barry located on the farm, where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried, the drying process is interrupted and the tobacco is permitted to absorb moisture and again dried (RB 215-216). The drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the bulking plant involved in this case (ibid.). All the tobacco goes through this drying and redrying treatment in the barns before it reaches the bulking plant. Although some fermentation begins at this stage, the treatment in the barns is essentially a simple drying operation during which the moisture content of the tobacco is decreased from between 85% and 80% to between 25% and 10%, a moisture content of 25% being required for best results in the subsequent bulking and fermentation process. (RK 15, 41, 44). As each prinning reaches the appropriate stage, it must immediately be packed in boxes and taken from the farms to the bulking plant for further processing.

The bulking process, although in one sense a continuation of the preliminary curing which begins in the barn, is a much more complex pro-

cess requiring extensive industrial equipment and much more carefully confrolled conditions. (RK 39-47. In the bulking plant; the tobacco is imme diately placed in piles known as "bulks" consist ing of and requiring from 3,500 to 4,500 pointed of tobacco; any lesser amount with not retain and generate sufficient heat for the weating and fer mentation process. During this operation the temperature within the bulks is closely watched each day, and at regular intervals of from six to eight days the bulk is turned or shaken out, that is, the tobacco on the outside is placed on the inside and that on the top is placed on the bottom until the tobacco is in a condition in which it may be worked. At this point, the tobacco is then separated, graded, kased (sprayed with water), and again placed in bulks where the fermentation and the turning of the bulk continues until such gs time as the tobacco is in condition to be baled (RB 72-73/1000 . .

Expert evidence in the record of the Kiny Edward case reveals that the bulking process involves considerably more than simply drying out or removing moisture from the tobacco. The process is described as a "fermentation" or "aging" process which is "largely a process of slow combustion" (RK 42), involving carefully controlled regislation of heat and temperature conditions to insure "development of the desired odor and aroma and elimination of the rawness or harshness and in part the bitter taste which characterize

all freshly cured leaf. . . It is quite important. therefore, that the fermentation be properly con-(RK 39) Insorder to maintain proper temperature distribution throughout the bulking process it is necessary that the bulk be "jorn down and rebuilt" and the contents "redistributed" several times, and additional water added. "After each rebuilding of the bulk temperafure rises more slowly and fails to attain the previous maximum unless additional water has been added. (RK 45). This bulk reconstruction process must be repeated usually from three to five times before the fermentation is completed (ibid.). Substantial dry matter, as well as moisture, is lost during the fermentation process, sometimes more, dry matter than moisture (RK) 47). "There is an important loss of nicotine, commonly ranging from 15 to 25 per cent or more of the total originally present" (RK 47), and what starch or sugar content there may be in the tobacco is further reduced (RK 47-48). The bulking process "lasts 6 to 12 months or longer" (RK 44: RB 75, 86);

2. The tobacco bulking process requires a large amount of valuable and expensive equipment, including a steam heated plant equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, bulk covers, baling boxes and presses, wax paper, baling mats, packing, sorting and grading tables (RB 73, 100). These operations also require

workers with special knowledge and experience in the processing of toluceo. Such a bilking plant cannot be economically oxined or operated by the ordinary small farmer growing lessation the acres of this type tobacco a year; (RB 61). Cultivation: of less than 6a acres per year, moreover, will not yield an adequate bulk of each priming for the processing operations (RB 61-62). Of the approximately 300 farmers growing Type 62 tobacco; 80 percent grow less than 25 acres per year and the majority grow from 11., to 10 acres per year (RB 61, 212). There are only 11 bulking plant operators engaged in processing Type 62 tobacco and tayo of these are not growers at all (RK 98, 148). Only five, or 1.6 percent, of the 200 growers maintain bulking plants processing only tobacco grown by the processor (RB 2D); RK 1180; Thus, the overwhelming majority of farmers have their to bacco processed by others.

3. Respondent Budd Company grows no tobacco itself and gentines its operations to processing the tobacco grown by 52 (the number for 1950) small farmers (on a total of 263 acres) under an individual contract pursuant to which each farmer "theoretically took over the packing house with all its equipment and the employees (approximately 108) of the Budd Company for the processing of his own tobacco and sold the tobacco, when processed, to the Budd Company? (RB 217): Budd established a system of bookkeeping whereby each farmer paid the actual cost of the processing of the tobacco grown by him and the Budd paid

the employees (*ibid.*). During 1950, all of the 353,889 pounds of tobacco grown by these 52 farmers which was processed by Budd was also purchased by Budd, which sold 231,209 pounds to the Budd Cigar Company; the remainder of the tobacco was sold in interstate commerce to various other persons or companies (*ibid.*). Respondent Joseph T. Budd, Jr., is president of the Budd Cigar Company and as such is active in the management of that corporation (RB 202, 204).

4. The other two plants involved in this litigation (those of respondents King Edward and May) process only tobacco produced on farms operated by the processor. In addition to the plant involved in this litigation, respondent King Edward also operates two other bulking plants at which it processes substantial amounts of tobacco grown by others (RK 23). For 1951, Kings Edward bulked at its three plants approximately 595,901 pounds of tobacco, of which 354,967 was not grown on its farms but was purchased from other growers (RK 23-24).

Each farm and each bulking plant operated by King Edward is under the direct supervision of a superintendent who hires fires, controls, and pays the employees (RK 24). Each bulking plant has its own separate payroll and production records

² King Edward, however, owns none of the farm lands tenant houses, warehouses or land beneath the warehouse, all of which is owned by Jno. Swisher & Son, Inc. of which king Edward is an affiliate (RK 22, 23); such lands and building are leased to King Edward on an annual rental basis of approximately \$100,000 (RK 23).

which are maintained by King Edward's main of. fice employees from records forwarded by the valons superintendent (RK, 25). Different waster seales are maintained as between farm employees. and plant employees (ibid.). The cost to Kir Edward, in 1950, for toback mirchard from others was \$744,262.39, whereas the farm cost for great ing tobacco on its rented farms amounted to only \$482,709.80 (RK 21). The bulking plant corner the 1950 crop was \$215,463,47, plus an "adminis trative cost of \$62.643.06 (Thid.); the farmers of \$482,709.80 represented approximately 32 per cent of the total cost of \$1,505,078.72 to King Ed ward for its operations on the 1950 erop (thid:) 5. The Budd plant employs approximately 10 employees in bulking, sorting, grading and balke. tobacco (RB 82, 90, 201, 201), while King Lilwin employs approximately 120 employees and May approximately 70 employees in the same operations (RK 2, 7, 12, 60, 69). The parties agree that none of the employees engaged in such operations were paid the minimum wage required by the Act 1815 201, 204; RK 81, 112); nor have the respondent maintained the records of wages, boins and other . conditions of employment required by the Act (RB# 230; RK 81, 113);

On cross-motions for summary judgment filed by the respective parties, the District Court entered decrees (RB 229-231; RK 136-138) enjoining to spondents from violating the minimum wage and record keeping provisions of the Act. The District Court held that the Act's agriculture exemption (App. B, intro, pp. 11, 15) ends when the tobacco reacties the receiving platform of the bulking plant, and rejected respondents' claims that their bulking plant employeessure exempt from the Act under Sections 13 (a) 96) and 13 (a) (10) (App. B, intro, p. 45) (114 F, Supp. 865).

The Court of Appeals reversed, helding that the agriculture exemption applies to employees in the King Edward and May plants which process only tobacco grown by the processor, and that the Section 13(a)(10) exemption (App. B. intra, p. 45) applies to the processing plants of all three of the respondents when the operations are performed within the "area of production." The court recognized that one of the conditions of the Administrator's definition of "area of production" was not met by any of the processing plants, but it held that the definition was invalid insofar as it limits the area of production to "the open country or in a rural community" and excludes "any city, town or urban place of 2,500 or greater population." The court ruled that the Secretary of Labor was in no position to seek the remedy of injunction until a valid definition is made since respondents "might likely fall with [in] a valid definition.

REASONS FOR GRANTING THE WEITS

The decision below, in holding invalid the Administrator's regulation defining "area of production," conflicts squarely with the decision of the Court of Appeals for the Tenth Circuit in Tobin v. Traders Company, 199 F. 2d 8, certiorari denied, 344 U. S. 909, rehearing denied, 344 U. S.

1. Section 13 (a) (10) (App. B., intra, p. 45) exempts from the minimum wage requirements any individual employed within the area of production (as defined by the Administrator), engaged in specified activities on varricultural or horticultural commodities. The regulation ruled invalid by the Fifth Circuit, and upheld by the Tenth Circuit, was promulgated about two years after a previous definition of varea of production had been overthrown in Addison v. Holly Will Co., 322 U.S. 607. The defect of that definition was its inclusion of a limitation on the number of em-

Section 7(c) (App. B., inter, pp. 44-45) also provides that in the case of an employer engaged, in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations" the overtime provisions shall not apply "during a period or periods of not more than fourteen workweeks in the aggregate in any calendar, year."

The regulation was issued December 189 1946, and was effective March 1, 1947

ployees that might be employed in the plant seeking exemption. The 'redefinition' was issued after careful study of this Court's opinion in the Holly Hill case, after extensive investigation and conferences with various interested parties, and after public hearings conducted on behalf of the Administrator, at which testimony, recommendations, and representations were adduced by industry and employee representatives. In addition to the six formal hearings, numerous informal conferences were held throughout the country with representatives of labor and of the industries involved. Sub. stantial economic data, including economic reports treating specific industries affected by the proposed definition, was assembled by the Department of Labor. After all these studies were completed, the Administrator published detailed findings indicating-the major considerations entering ixto the promulgation of the redefinition and explaining. the manner in which he sought to apply the principles enunciated in Holly Hill, -3 CCH Labor Law Reporter, par. 23,282 (App. B, infra, pp. 48-70). .

The objective of the redefinition, as stated by the Administrator in his findings (ibid.), was to meet the requirement of Holly Hill that the definition be in terms of "area" or "geographic bounds." but also with recognition that the task involved "complicated economic factors" which "the Ads" ministrator may properly weigh and synthesize." 322 U.S. at 614-616. The redefinition omitted the objectionable limitation of the previous definition and prescribed that the place of employment must

be located (1) "in the open country or in a rural community" (which for "purposes of this regulation" "shall not include any city, town, or urban place of 2,500 or greater population") and (2) within a specified mileage distance from the source of 95 percent of its commodities. (App. B. infra, pp. 46-47).

The Traders Compress decision, Supra, sus tained the "rural area" as well as the mileage distance tests of the regulation. It held that "the Administrator's definitive regulation is based upon relevant economic factors, that it does bear a reasonable relationship to the purposes of the exemption, and is therefore not arbitrary and capricious," Specifically on the "rural area" test, the court stated: "From an analysis of available data, the Administrator recognized that the size of a town is not a perfect criterion of its urban ör industrial character, but it was adopted as the best available test; and leads to results generally accurate" (199 F. 2d at 11): "Having in " mind that the primary object of the definition is: to attempt to arrive at an economic balance between rural and industrial labor conditions we cannot say that population of cities and towns is not a relevant economic factor in determining

With respect to operations on tobacco the distance prescribed is 50 airline miles. Respondents balking plants concededly meet the mileage test but do not meet the "rural area" test mashinch as they are located in a town with a population greater than 2,500. Quincy, Fla. has a population, according to the 1950 census, of 6,586 (RB 86).

whether labor conditions are predominantly rural or industrial." (Ibid.).

This Court denied the petition for certiorari. 344 U.S. 909. There was at that time no conflict among the courts of appeals, the Traders Compress decision being the first appellate decision on the question of the validity of the Administrator's redefinition of "area of production" subsequent to this Court's ruling in Addison v. Holly Hill Co., 322 U.S. 607. The Government did not oppose the petition for certiorari in Traders Compress, despite the apparent correctness of the decision and the absence of any conflicting decisions, because of the importance of the issue.

There is now a direct conflict between the Tenth and Fifth Circuits. In addition to the decision below, the Fifth Circuit has explicitly disagreed with and declined to follow the Traders Compress decision in two other cases involving operations identical to those involved in Traders Compress. See Jenkins v. Durkin, 208 F. 2d 941, and Lovvorn v. Miller, 215 F. 2d 601. The instant case is indistinguishable from Traders Compress except

In the Jenkins case, the employer's establishment met neither the indeage distance condition nor the rural area condition. Since the court upheld the validity of the mileage distance condition, it ruled that the exemption was inapplicable even though the rural area condition was invalid. No petition for certiorari was filed by the Government because the judgment in favor of the Secretary was affirmed by the Court of Appeals. The Lorvorn case was a suit between private litigants, to which the Government was not a party and therefore in no position to seek certiorari.

for the fact that processing operations on tobacco, rather than on cotton, are involved. That this difference is immaterial is evident from the fact that the decision below on this issue simply reaffirmed the two previous ruling of the Eifth Circuit in cases which did involve cotton operations.

As this Court observed in Holly Hill, the question of the validity of the definition of "area of production" is "a much litigated question of importance in the administration of the Fair Labor Standards Act." Addison v. Holly Hill Co., 222 U.S. 607, 609. The definition limits two exemptions provided in the Act for operations on agricultural or horticultural commodities, Sections 7. (e) and 13(a)(10) (see supra, p. 11), and, consequently, determines applicability of the Act to a large number of employees employed in a wide variety of activities. Several years of delay in enforcement of the Act with respect to such activities resulted from the invalidity of the Administrator's previous definition. Unless and untilthe validity of the new regulation is settled by this Court, numerous workers employed in many types of industrial or quasi-industrial processing within the Fifth Circuit will be denied the minimum wage and overtime benefits of the Act. Moreover, employers within the Fifth Circuit will enjoy a substantial competitive advantage over those located in the adjoining Tenth Circuit.

2. The decision below is not only in conflict with that of the Tenth Circuit; it is also incorrect in ruling that the Administrator's new definition of "area of production" is invalid.

While holding that Congress intended the definition to be drawn in terms of "area" and "territorial bounds," this Court explicitly recognized in Holly Hill that the Administrator's task was not a simple map-making task, but involved "complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production." 322 U.S. at 613-614. The decision expressly recognized that there is a "choice of areas open to [the Administrator!" depending upon consideration of these economic factors (id. at 619), and he "may properly weigh and synthesize all such [economie] factors" (id. at 614); "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter" (id. at 614). As stated in the majority opinion in Traders Compress, 'from the Addison. [Holly Hill] case, we are clear that area of production' cannot be measured or delineated by the mere fact of production alone. If the task had been deemed that simple, Congress could have easily provided its own definition without resort to administrative implementation" (199 F. 2d at 10).

On the basis of a careful and exhaustive survey (supra, p. 12), the Administrator adopted two basic criteria, both formulated in terms of geographic area but at the same time taking into ac-

count the complicated economic factors which, as this Court recognized, Congress intended to be considered. The first of these criteria, the mileage test (supra, p. 13), is admittedly met by all three respondents here and is not at issue in this case.6 The second criterion—that the employment be within a rural area (supra, p. 13)—was based upon the plain Congressional intent to distinguish between rural communities and the urbangenters" (App. B. infra, p. 49; see 322 U.S. at 615). This problem was approached directly by drawing the bounds of the area of production so as to exclude, insofar as was feasible in a definition of general application, the centers of industrial production without excluding the area of agricultural production. The Administrator's findings state: "An analysis of all the available data indicated * * * that while the size of a town is not a perfect cri-, terion of its urban or industrial character, it is nevertheless the best available test, and leads to results which in general are accurate enough to warrant its adoption" (App. B. infra, pp. 56-57). The results reached by other Government agencies having long experience in distinguishing between rural and urban areas were heavily relied upon in

This question presents no conflict since the only two Courts of Appeals who have decided the question the Fifth and Tenth, have "moveld the validity of this test. In addition to Traders Compress, in which both the "mileage" and "rural area," tests were held valid by the Tenth Circuit, see Jenkins v. Durkin, 208 F. 2d 941 (C.A. 5). A similar test was also held valid by the Fifth Circuit prior to the Holly Hill decision. See Fleming v. Farmers Peanut Co. 128 F. 2d 404.

choosing the 2,500 tignre (App. B, intro, p. 58). As the industrial areas of cities were found generally to extend at least short distances beyond their political boundaries, a mileage tolerance for this test was found necessary to avoid discrimination not based on substantial ecosomic differences (App. B, intrd, pp. 59:60).

Although this Court expressly declined to comment on the validity of the "ruralarea" (sometimes referred to & "population"), test in Holly Hill, because the establishment there involved met this test, 322 U.S. at 610, it is an indisputable fact that agricultural production of any significance is usually carried on in rural areas and not in urban centers. This is one of the "economic factors" which the Administrator could scarcely ignore. Even under the view of the court below, that the Administrator is restricted to defining the geographic bounds of the land area within which the particular commodity is actually produced, it would be difficult to find fault with that part of the definition which merely excludes the centers of urban life. This aspect of the definition accords with the legislative history, which, as this Court noted in Holly Hill, shows that Congressman Biermann, who sponsored the statutory provision in question, in dicated "plainly enough" that he had in mind differences between establishments in "rural communities and urban centers," 322 U.S. at 615. Certainly, the 2,500 "population" or "rural area" test cannot be regarded as arbitrary or unrelated

to the factors the Administrator was the cted to

there were any doubt of the validity of the ... Idministrator's redefinition, it has been eliminated. we submit, by Congressional approval subsequent to its issuance. Congress has repeatedly been advised of the redefinition and of the criticisms of it. and has off several occasions declined to enact spe-" cific proposals to revise the regulation and the stat atory provision under which it was issued. Not only have interested employers criticized the definition and proposed specific amendments to Congressional committees? but the Administrator and the Secretary of Tabor on numerous occasions have recommended revision of Section 13(a)(10) in order to alleviate certain recognized competitive inequities and administrative difficulties wherent in any valid definition of "area of production." This recommeridation has been repeated on numerous occasions by the Administrator and the Secretary of Labor, both through annual reports to Colligress.

The attorney who represented the Traders Compress Company appeared before both the Senate and House Committees and made the same arguments against the Administrator's definition, including a direct attack upon the "rural area" test, that he later advanced before the Tento Circuis in Traders Compress. See Hearings before a Subcommittee of the Consentree on Labor and Public Welfare on S. 58, S. 67, S. 92, S. 195, S. 180, S. 248, and S. 653, 81st Cong. 1st Sess. (1949), pp. 658-765, and Hearings before the Committee on Education and Labor on H. R. 2033, 81st Cong. 1st Sess. (1949), Vol. 1, pp. 872-887, 912-945.

[&]quot;Hlustrative are the 1948 Annual Report of the Wage and Hour and Public Contracts Divisions, pp. 123-134, and the 1950 Annual Report of the Scretary of Labor, pp. 281-285

and in appearances before Congressional committees considering the subject." The aftermath of the gestimony and recommendations before the Congressional committees considering the 1949 amendments to the Act was a recommendation by the Senate Committeee for repeal of the exemption altogether. The bill as passed by the Senate, however, retained the exemption in its original form (95-Cong. Rec. 12435-12436). Although the House bill would have amended the exemption to transfer authority to define "area of production" from the Administrator to the Secretary of Agriculture, this was abandoned in conference and the bill, as enacted, left the "area of production" provision unchanged (95 Cong. Rec. 14933).

Indeed, Congress has had actual knowledge of the redefinition practically since it was issued. In February 1947, the redefinition and the Administrator's findings were both called to the attention of a House subcommittee considering the Portal-to-Portal Act of 1947. A number of witnesses appearing before this subcommittee testified that the "rural area" test of the redefinition would remove from the "area of production" many employers who would be within it under the definition invalidated in Holly Hill. Undoubtedly, it was this testi-

⁹ For example, see the testimony of the Administrator before the House Committee considering the 1949 Amendments to the Act. Hearings before the Committee on Education and Labor on H. R. 2033, 81st Cong. 1st Sess. (1949), p. 56.

¹⁶ See Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 584 and H. J. Res. 91, pp. 210-221.

mony that led to the enactment of Section 12 of the Portal to Portal Act of 1947 (29 U.S.C. 251, 261) which specifically referred to the redefinition in providing exemption from liability that might have been incurred through its retroactive operation.

Not only did Congress thus decline to modify the Administrator's regulation or revise the statutory language, but it affirmatively approved existing administrative regulations by providing in Section 16 (c) of the Fair Labor Standards Amendments of 1949 that "any order, regulation, or interpretation of the Administrator of the Wage and Hour Division. * * * in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect except to be extent that any such order, regulation [ete.] * * * may be inconsistent with the * *." This legislative acprovisions of this Act tion was taken, as we have indicated, in the face of repeated petititions for revision of the "area of production" requirements by both interested employ-. eys and the officials charged with enforcement of the Act. It would seem to follow, a fartiori from this Court's decisions, that Congress has confirmed and · ratified the Administrator's regulation redefining. "area of production." See Alstate Construction Co. v. Durkin, 345. U.S. 13, 16-17; Maneja V. Woralna Agricultural Co., 349 U.S. 254, 270.

3. The additional ruling below that the bulking a plant employees of respondents King Edward and May are exempt as engaged in "agriculture" is in consistent with this Court's recent decision in

Maneja v. Waialna Agricultural Company, 349 U.S. 254.

The Fifth Circuit's opinion, which was rendered prior to this Court's decision in Waialua, relies solely on two factors which, under the Wainlan decision, plainly do not determine the applicability of the agriculture exemption: These two factors are (1) that King Edward and May, at the plants in question, processed tobacco leaf "grown exchisively on their farms" and (2) that the bulking process is "essential for the marketing" of this type of tobacco. Both of these factors were at least equally present in Waialaa. The agriculture exemption was held inapplicable to Waialua's sugar processing plant despite the fact that Waiahia, like the blants of King Edward and May, processed only its own grown agricultural commodity, and despite the fact that the commodity (unmilled sugar cane) is "unmarketable as such" and "must be processed within a few days of harvesting or ser-Yous spoilage will result" (349 U.S. at 257, 265).

On the other hand, the factors—ignored by the court below—which this Court held in *Waialia* to be most pertinent and significant are equally, if not more, determinative in the instant cases. One of the factors especially emphasized by this Court is "what is ordinarily done by farmers with regard to this type of operation," the pertinent consideration being "not the proportion of millers who grow their own cane but the percentage of farmers who engage in milling" (349 U.S. at 265, 267). The undisputed facts in the present records show that

tobacco farmers do not ordinarily perform the bulking operation. Of the approximately 300 farmers who grow Type 62 tobacco in Florida, only 9 maintain and operate their own bulking plants (See Statement, supra, p. 7). The remaining farmers have their crop processed by others. Thus, Budd, which is an independently operated plant, processed tobacco grown by 52 small farmers (RB 217). And King Edward purchased from other farmers almost 60°, of the total poundage bulked at its plants during 1951; the cost of the crop purchased from others represented about 68 percent? of its total seef for the 1950 crop processed at its three plants (BK 23-24). See supra, pp. 7-5.

Other factors which the Wainlan decision emphasized as of particular significance were the 'quasi-industrial" nature of the operation during the course of which the commodity "is changed from 'its raw or natural state.' " and the "the omission * * fof the operation from the exemption provided by Section 13(a)(10) for various processing operations performed within the area of production \$2349 U.S. at 267, 268. The instant cases are indistinguishable from Waialua in these respects, also. As shown intra, pp. 24-29, the court below erroneously assumed that the tobacco bulking operation is included in Section 13(a) (10). and its reasoning that the extension of the agriculture exemption to the King Edward and May plants would not result in discrimination against ? the small farmer rests upon this ergoneous construction of Section 13(a) (10 : Indeed, even on

the court's reading of Section 13(a)(10), the effect of its holding, far from equalizing the status of targe and small farmers. (cf. Wordina decision. 349 U.S. at 268), is to give large growers like King Edward and May a decided advantage over the small farmer. For under the Fifth Circuit's view of the "agricultural" exemption the King Edward and May plants are wholly exempt from both minimum wage and overtime requirements of the Act, whereas, if the Administrator's definition of "area of production" is valid, as we believe is the case (supra, pp. 15-21), the Budd plant has no exemption (even if it be assumed that Section 13(a)(10) applies to the tobacco bulking operation).

4. As just mentioned, the decision below is also incorrect in Lolding that the bulking of tobacco is within the scope of the operations enumerated in Section 13(a)(10). (App., B., infra., p. 45). This section does not exempt every operation which in a broad case may be necessary for marketing agricultural products. The contrary, the exemption is limited to individuals engaged only in the specifically enumerated operations on tagricultural or horticultural commodities. Tobacco bulking is not only not one of the specifically enumerated operations but bulked tobacco is not an "agricultural or horticultural" commodity in the way that term is used in Section 13(a) (10).

(a). The tobacco bulking process is not specifically enumerated as are "ginning." "pasteurizing," "compressing" and "compressing" which are

forms of quasi-industrial processing that may change the natural state of the commodity in a way That might be analogous to tobacco bulking. Plry ing "is also specifically enumerated, but that term. by any recognized definition, is limited to simple dehydration or removal of moisture. Plainly, the term does not include anything so complex as balk ing, which indeed involves more addition than it does removal of moisture." The most comprehensive term enumerated in the section is preparing" and it is expressly limited to "preparing in their raw and natural state.", From the legislative history it is clear that this term contemplates only such simple operations as washing the raw com-Amodity, not "processing" the commodity into an industrial product. See collowing among Senators Barkley, Schwellenbach, and Black, 81 Cong. Rec. 7877-7878.

If seems equally apparent that the other general terms, "handling," "packing" or "storing," refer also to simple non-processing operations, such as loading and "unloading ocommodities or weighing or moving them from one place to an other, placing them in containers or in storage rooms, and preparing activities which do not substantially change the raw or natural state of the

bulking is not a simple drying operation. Most of the moisture has been removed in the preliminary drying process in the barris on the farm before the tobacco reaches the talking plants (RK II 51 RB 216). The drying operation which takes place in the barris refluers the context from between 80 and 55

commodities. . The tobacco bulking process is considerably more complex and substantial. sugar milling, it is more of an "industrial" or "magnificturing operation" in the course of which the tobacco is very substantially "changed from its 'raw or natural state' " into an industrial product and is, therefore, no longer an "agricultural or horticultural" commodity within the meaning of Section 13(a) (10). See Waialya opinion, 349 U.S. at 265, 268. Whether or not the term "raw or natural state", grammatically modifies all of the preceding operations in Section 13(a)(10), as the courts have held,12 the context in which the phrase "agricultural or horticultural commodifiés" is used, as well as the relationship of this exemption to other exemptions for processing of such commodifies (notably Section 7(c)), demonstrate that the "handling," "kacking," "storing," and "preparing" operations must all relate to a commodity not yet subjected to industrial processing.

As this Court recognized in the Waialun case (349 U.S. 254), and as the Courts of Appeals have long held, the various exemptions for operations related to "agriculture" "are in pari materia and must be construed together to form a consist-

percent to between 25 and 10 percent, which is about the same moisture content of the tobacco when the bulking process is completed. (Ibal). Thus, while the operation in the barns is essentially a drying operation, the bulking process requires much more carefully conditioned and prolonged treatment with the use of the extensive industrial equipment (see Statement, supra. pp. 3-7).

^{**}See Paceto Rico Tobacco Macketing Coop. Ass'n v. Mcf cmb, 181 F. 2d 697, 701, (C.A. Le., Wyett v. Haltville Alfalfa • Mills, 106 F. Supp. 624, 631 (S. D. Cal.).

ent whole, if possible" (Bown v. Conzale:, 117 F. 2d 11, 17 (C.A. F)). Also, see Strattin v. Farmers Produce Co., 134 F. 2d 825 (C.A. 8)). Section 7 (c). which together with Section 1β(a)(10) establishes an integrated pattern of exemption for activities closely related to agriculture, provides a 14 workweek exemption from the overtime provisions of the Act for "the first processing, within the area of production (as defined by the Administrator). of any agricultural or horticultural commodity during seasonal operations." [Emphasis@added] (App. B, inira, pp. 44-45). Section 13(a) (10), on the other hand, grants a complete wage and hour exemption to "any individual employed within the area of production (as defined by the Administrater), engaged in handling, packing, storing drying, preparing in their raw or natural state * * * agricultural or horticultural commodities for market." Since both sections apply to "agricultural or horticultural commodities" and both are restricted to employees employed within the "area of production (as defined by the Administrator)," the significant difference in language lies in the term "first processing" in Section 7(c).

It seems plain that the general terms "handling," etc., used in Section 13(a)(10) do not include any operations which properly may be classified as "first processing." Otherwise, the limited exemption in Section 7(c) becomes meaningless in view of the complete exemption in Section 13(a)(10). See Bowie v. Gonzalez, supra, 117 F. 2d at 18-19. Bulking would constitute "first processing" under

Section 7(c) rather than any of the operations listed in Section 13(a)(10). It is important that this construction of two exemption provisions be adopted, for, if the general terms in Section 13(a) (10) are broadly construed to include industrial processes which substantially change the natural form of agricultural commodities, the minimum wage benefits of the Act will be denied to large numbers of workers, not only in tobacco processing plants, but also in a wide variety of other industrial plants processing agricultural commodities.

(b). The Administrator's interpretation that the tobacco bulking process is not included in Sections 13(a)(10), like the Administrator's regulation defining 'area of production' (see supra, pp. 19-21), has been ratified by subsequent legislative developments. The interpretation was repeatedly stated and published long before the enactment of the 1949 Amendments to the Act, and was clarified beyond doubt at the time of the issuance of the regulation amending. Area of Production As'Used in Section 7(c) of the Fair Labor Standards Act' on November 18, 1948 (13 F.R. 7347). That regulation stated specifically with reference to the tobacco bulking process:

The amendments * * * are intended, among other things, to make it clear that in Puerto Rico, as elsewhere, bulking of leaf tobacco, which characteristically involves processing operations not mentioned in section, 13(10)(10) of the Fair Labor Standards Act, will not pro-

cide a basis for exemption under that section.
[Emphasis added.] [3 CCH Labor
Law Reporter (4th ed.), par. 23, 281.]

This clear administrative construction of the exemption was outstanding at the time of the enactment of the Fair Labor Standards Amendment of 1949 (October 26, 1949) and is, therefore, within the scope of Section 16(c) of that Act which explicitly kept "in effect" outstanding interpretations of the Administrator or the Secretary, not inconsistent with those amendments. See supra, p. 21.

CONCLUSION

It is respectfully submitted that this perition for writs of certiorari should be granted.

> Simon E. Sobeloef, Solicitor General.

STUART ROTHMAN, Solicitor,

BESSIE MARGOLIN,

Assistant Solicitor.

JAMES R. BILIANGSLEY,

Attorney.

United States Department of Labor.

JULY 1955

APPENDIX A

Opinion of the Court of Appeals

TS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CHRYST

No. 15016

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO. BART-NEBS, DOING BUSINESS AS J. T. BUDD, JR. AND COMPANY, APPELLANTS

rersils

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLEE

and

No. 15071

King Edward Tobacco Company of Florida and May Tobacco Company, Intervenor, appellants

versus

James P. Metchell, Secretary of Labor, United States Department of Labor, appellee

Appeals from the United States District Court for the Northern District of Florida

(April 15, 1955)

Before Hutcheson, Chief Judge, and Rives and Tuttle, Circuit Judges.

Rives, Circuit Judge: The opinion of the district Court in these cases is reported at 114 F. Supp. 865. The Budd case was the action first brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act 'to enjoin the Budds from violating the minimum wage and record keeping provisions of the Act. At the conclusions of a pre-trial conference on that case, the district court was of the opinion that the Budd company operation was in violation of the Act, but, in order to avoid putting the small farmers, whose tobacco was processed by the Budds, at an economic disadvantage to the operators who processed their own tobacco exclusively, the court insisted that before decision in the Budd case, the issues be broadened to include such large operations. Accordingly, suit was brought against the King Edward Company and the May Company intervened.

The cases involve the definition of "Agriculture" under Title 29 U.S.C.A. Section 203(f), the agricultural exemptions under Section 213(a), clauses 6 and 10.

⁴ Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C.A. 201, et seq., as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910.

^{2&}quot;(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section [141](g) of Title 12), the raising of livestock, bees fur-bearing animals, or poultry, and any practices (including any torestry or lumbering operations) performed by a farmer or on a farm as an incident to or the confunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

^{3 \$ 213.} Exemptions

that The provisions of sections 206 and 207 of this title shall not apply with respect to (6) any employee employed in agriculture or in connection with the operation or maintenance of diffches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes.

and incidentally the exemption from the maximum hours provision under Section 207(c).

All of appellant's processing operations are in connection with U.S. Type 62 Sumatra tobacco, which is a leaf tobacco grown and used entirely for cigar wrappers. This type of tobacco is grown exclusively in three counties in North Florida, and two counties in South Georgia contiguous to two of said Florida counties. Most of such tobacco is grown within an airline radius of thirty miles of Quincy, the County Seat of Gadsden County, Florida.

We quote from the opinion of the district court:

Method of Growing, Harvesting and Marketing Type 62 Shade Leaf Tobacco

(16) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw of natural state, or canning of agricultural or herticultural commodities for market, or in making cheese or butter or other dairy products.

" \$207 Maximum hours"

"(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cetton. or in the processing of cottonseed, or in the processing of sugar ·beets, sugar-beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection ta; of this title shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in cantaing or packing, perishable or sca-onal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commonity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a) of this title, during a period or berieds of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

"Type 62 shade left tobacco requires special and pain-taking cultivation, harvesting, curing, and preparation for market. It grows in fields inclosed in a cheesecloth shade, which completely covers and incloses the tobacco field. The cheesecloth is supported by wires strung on pasts placed at regular intervals through the fields. It is highly fertilized and intensively cultivated during the growing period. When each leaf reaches a certain stage of maturity it is promptly harvested. This barvesting process is known as 'priming'. lower leaves are picked first, perhaps not more than two or three from each stalk. This picking is repeated as the tobacco matures on up the stalk until all the market) ble leaves have been removed. At each priming the tobacco is immediately taken to a tobacco barn located on the farm where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried the dryingprocess is interrupted and it is permitted to absorb moisture and again dried. This drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the packing house.

It is then taken from the barns in the field, placed in appropriate containers and carried to the packing house where it is placed in piles known as bulks, for curing. Each bulk consists of more than 3000 lbs, of tobacco. The packing houses are equipped with machinery for the appropriate humidification and curing of the tobacco. During the curing period, the temperature within each bulk is closely watched from day to day and at regular intervals, when the appropriate time has arrived, the bulk is broken up, the tobacco leaves shaken out and those on the outside placed on the inside of the new bulk and those on the inside placed on

the outside for further curing. This process is continued until the tobacco is ready for market when it is bailed (sic) for shipment. Durkin v. Budd. 114 F. Supp. 865, 866-867.

After such processing, this type tobacco falls into eight main classifications, and none of those classifications can be determined prior to the processing. Primarily, because it cannot be graded until it has been processed, there is no market at an earlier stars for this type tobacco. The market variation dependent upon grading is considerable, ranging from a high of approximately \$2.40 per pound down to as low as \$.40 per pound.

Some 300 farmers in the Quincy area grow this type of tobacco with about 80% growing and harvesting less than 25 acres per year, and a majority producing only 1½ to 10 acres per year. As has been noted, the natural heating, fermentation, and curing of this tobacco requires bulks of more than 3000 lbs. of tobacco. The small farmers do not grow the tobacco in such quantities, and, hence, cannot process their own tobacco. For the year 1950, some 52 of such small farmers cultivating a total of 263 acres had their tobacco processed by the Budd Company. That company grows no tobacco of its own but processes tobacco grown by others.

During 1930, the King Edward Tobacco Company enlitivated 206 acres, and the May Company 90 acres of this type tobacco, and those two companies processed their own tobacco, and did not handle the tobacco of any other person at the packing houses here involved. Those packing houses are located in the town of Quincy, which, according to the 1950 census had a population of 6,586, and the Budds' packing house is also in that town. As the height of the packing season, May employs approximately 70 employees in its packing plant, King Edward some 120 employees, and Budd

approximately 108 employees. The majority of all such employees work also on the farms when not engaged in work at the packing plants. Other pertinent facts appear in the opinion of the district court.

King Edward and May claim that their employees are exempt from the provisions of the Act under Section 213(a)(6) because they are employed in agriculture. As to King Edward and May, the appelled concedes that:

"Appellants are admittedly farmers in their growing operations, and admittedly the mere fact that they are large growers does not affect the availability of the exemption to them insofar as they are in fact farmers." But obviously appellants are also something else in addition to being growers—they are also operating separate and extensive commercial enterprises, of the same character as similar independently owned and operated packing houses."

The district court held "that upon the record in this case the farming exemption ends when the tobacco reaches the receiving platform of the packing house "114 F. Supp. 868. We cannot agree. It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops, and that the work of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes "practices performed by a faguer as an incident to or in conjunction with sach-

See Addison v. Holly Hill Fruit Products Co., Inc., 322 U.S. 607, 614, 615; N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 2d 184, 187; Waialua Gricultural Co. v. Maneja, 9th Cir., 216 F. 2d 466, 474, 475.

farming operations, including proparation for market, within the meaning of Section 203(f).

All of the appellants claim that their employees are exempt from the Act by virtue of Section 213(a) (10) sisce footnote 3. supral, because their operation and one V-those enumerated in that section and necessary for the marketing of their crops, and because the Ad ministrator exceeded his authority in excluding from the "area of production", "any city, town or inclair." place of 2,500 or greater population." Appellee con-'codes, as it must, that this Circuit has already held that the Administrator did so exceed his authority. Appellee insists, however, that after it reached the packing house, the tobacco was no longer an "agricul, · tural or horticultural commodity", and that the proesting operation was not one of those enumerated in the section. The legislative history of Section 213(a) 210) makes clear that its primary purpose was to prekent discrimination against the small farmer. When

See Farmers Irrigation Co. v. McComb. 337 U.S. 755; Addison v. Holly Hill Fruit Products Co., Inc., 322 U.S. 667; N.L.R.B. v. John W. Campbell, Inc., 5th Cir., 159 F. 2d 184, 187; Waialua Agricultural Co. v. Maneja, 9th Cir., 246 F. 2d 466; American Sumatra Tobacco Corp. v. Tone. (Conn.) 15 Atl, 2nd, 80.

Tenkins v. Durkin, 5th Cir., 208 F22d 941; Lovvorn v. Miller, 5th Cir., 215 F. 2d 601. Cf. Tobin v. Traders Conspress Co., 10th Cir., 199 F. 2d 8. It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case.

Mr Schwellenbach. It we leave the bill the way it now stands, it is going to mean that the large producer on the large panch who can afford to maintain the equipment or his own ranch is going to have an unfair advantage over the small man who has early 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with afform a cooperative warehouse, and there have the same processes performed. SI Cong Rec. 7659.

But it seems that, so long as they remain in their natural

it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the employees of all of the uppellan's are exempt under Section 213(a)/40). Since we are of the opinion that the employees are exempt under Section 213(a) (40), we do not feel called upon to discuss the respective fields of operation of Spetotal exemption in that section and of the partial ex-

state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm of by a group of new gathered together in a cooperative, or turned over to a central warehouse they should be exempt, because of the fact that if we do not exempt them, we are giving the large producer a very distinct advantage over the small producer, and I are contain it is not the propose of the bill and issnot within the economic theory of the bill to give the large producer an advantage over the small producer. (Emp. asis supplied.) \$1. Cong. Rec. 7660.

Mr. Schwellenbach. The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature. In other words, in a small apple operation of 5 or 10 or 15 of 20 agrees; it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the waching operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary to such a same either to join other farmers in a cooperative or to send by apples to a packing house, and have these operations which are purely agricultural operations performed elsewhere than at the situs of the ranch or the farm

The pare pose of this amendment's to give protection against that situation, and to make it possible for the small trust and secretable produces to operate upon the same basis as the large fruit and secretable produces." (Emphasis supplied) 81

In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing markenery tall of the tracessary theidentials to this operation while emption in Section 207 (c) turther that to say that we agree with the Ninth Circuit that shell exemptions overlap and are not afternative or normally exclusive attached transfer of the Circuit Fig. v. Mahaja, 5th Circuits F. 24,603, 603.

Appellice insists, however, that Section 21200) are inoperative until the Administrator makes a valid definition of the area of production. That much one granted, but in a case like this, otherwise within the exemption, and which might likely fall with a valid definition of the area of production, the appelled is in the position to seek the equitable rentally designation until such definition that he has been made."

The judgments are, therefore, reversed and the causes remanded with directions to enter instrument, for the defendants, and for the intervenor, May Company.

Reversed and Remanded with Directions

the larger producer can afford them, and he is exampt from

The purpose of the bill. 81 Cong Rec. 7877

The purpose of the amendment is not for the protection of the packing plant or for the protect of of the coners of the packing plant. The cost is part to the producer. These packing plants just pass the control back to the man who produces the apples. The target pays the bill. The purpose of the amendment is to permit the small farmer, who cannot affect to have his own parchouse and cannot afford to have his own parchouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own washing machines and their own washing machines and their own equipment. (Emphasis supplied). 81 Cong. Rec. 7877

See also, the dissenting opinion in Addison v. Hally Hill Co. 3224 S. 607 at p. 633

See Flen Day v. Jarmers Peanut Co. 5th Cir. 128 F. 2d 401 of Paerto Ricce Vonacco Marketing Coop. V. n. Mr. Cinh. Let Cir. 181 V. 2d 607

Okla 107 F Supp 354 360 Walling a Med racken County Pegeb Growers Ass'n D.C. W. Dist Ky. 56 F Supp. 900; 905, 906 JUDGMENT

No. 15016.

Extract from the Minutes of April 15, 1955.

JOSEPH T. BUDD, JR., and FLORENCE W. BUDD, co-partners, doing business as J. T. BUDD, JR. AND COMPANY.

rersus

James P. Mirchell, Secretary of Labor, United States Department of Labor.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel:

On consideration whereof. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendants.

JUDGMENT

No. 15071.

Extract from the Minutes of April 15, 1955.

King Edward Tobacco Company of Florida and
May Tobacco Company, Intervenor.

· revens

James P. Mirchelle, Secretary of Labor, United States Department of Labor.

This cause came on to be heard on the transcript of

the Northern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendant, and for the intervenor, May Company.

SUPREME COURT OF THE UNITED STATES, October Term, 1955

No. -

James P. Mitchell, Secretary of Labor, United States
Department of Labor

18.

Joseph T. Budd, Jr., et al., d Joa Joseph T. Budd & Company, et al.

ORDER EXTENDING TIME TO FILE PETITION YOR WELL OF CERTIORARY.

Upon Consideration of the application of counsel for petitioner, 2

It Is Ordered that the time for filing petition for writ of certification the above entitled cause be, and the same is hereby, extended to and including August 1, 1955.

HUGO L. BLACK.
Associate Justice of the
Supreme Court of the United States.

Dated this 8th day of July, 1955.

APPENDIX 'B

Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. 201)

Sec. 3. [52 Stat. 1060] As used in this Act.

of hydriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Sec. 7. [63 Stat. 913] . . .

(c) In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-beet molasses, sugar-case, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any

place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing; perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subscription (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

Sec. 13, (a) [63 Stat. 218]

- (6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes:
- (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pastenrizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making choose or butter or other dairy products:

Text of the Administrator's regulation defining the

(29 C.F.R. 536.2) (Federal Register, December 25, 1946, 11 F.R. 14648, 13 F.R. 7347)

Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act. (a) An individual shall be regarded as employed in the "area of production" within the meaning of section 13(a)(10) of the Fair Labor Standards Act in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

- (1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the foll wing air line distances from the establishment:
- (i) With respect to the ginning of cotton— 10 miles;
- (ii) With respect to operations on fresh fruits and vegetables—15 miles;
- (iii) With respect to the storing of cotion and any operations on commodities not otherwise specified in this subsection—20 miles:
- (iv) With respect to the compressing and compress warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.
 - (b) For the purposes of this section:
- (1) "Open country or rural community" shall not include any city, town or urban place of 2,500 or greater population or any area within:

- (i) One air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or
- (ii) Three air line infles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or
- (iii) Five air-line miles of any city with a population of 500,000 or greater.

according to the latest available United States Census.

- (2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.
- (3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.
- (4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except

that dollar value shall be used if different commodities received in the establishment are customatily measured in physical units that are not comparable.

UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

New York, New York . . .

In the matter of the redefinition of the "area of production" as used in sections 7(c) and 13(a)(10) of the Fair Labor Standards Act of 1938

Findings of the Administrator December 48, 1946

These findings are primarily intended to provide a statement of the major considerations entering into the promulgation of the regulations redefining "area of production." The redefinition of the "area of production" was undertaken pursuant to the order of the United States Supreme Court in the case of Addison et al: v. Holly Hill Fruit Products, Inc. (322 U.S. 667). The specific issue before the Court in that case was the validity of the following definition contained in Regulations Part 536 issued by the Wage and Hour Division:

An individual shall be regarded as employed in the 'aren of production' within the meaning of section 13(a)(10) (1) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employes engaged in those operations in that establishment does not exceed seven (29 U.F.R. (1940 Supp.) 536.2)

The Supreme Court held these regulations to be invalid on the ground that the "area of production"

 $^{^{4}}$ A later revision of this definition increased the permissible number of employees from seven to ten, 29 C F R; (1941 Supp.) 5362.

could not be defined in terms of the number of employees in the plant, and remanded the case to the District Court "with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress." The Court noted the Congressional intent to distinguish between rural communities and the urban centers and indicated in the following language the general principles for drafting a new definition:

"The textual meaning of area of production is thus reinforced by its context: 'area', calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and mevitable diversities of litigation. And so Congress left the boundary making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and maximum hours.

"In delimiting the area the Administrator may properly weigh and synthesize all such factors."

Studies were initiated immediately after the Court's decision with a view to promulgating a new definition along the lines indicated in the opinion. Numerous conferences were held throughout the country with representatives of labor and of the industries involved. Economic reports dealing with commodities affected were prepared, and a large amount of economic data assembled. More economic material was presented at

December 1944 and March 1945 for the industries concerned with the following commodities: (1) fresh times and vegetables: (2) cotton: (3) tobacco: (4) grain; seeds; dry edible beans and dry edible peas: (5) dairy products, poultry and eggs; and (6) missellaneous agricultural and horticultural commodities not covered by the other hearings. One or more definitions were proposed for discussion at each of these bearings, but the scope of the hearing included consideration of any other proposals that might be presented.

. The invalidated definition had avoided most of the economic discriminations inherent in an exemption. of this kind by restricting the exemption to small establishments whose effect on the labor market and labor standards is negligible. After the Supreme Court's decision, a great variety of possible criteria. which could be used in defining the "area of production" for different agricultural commodities were explored. It was apparent, however, from pamerous studies unde by the Division that no valid criteria which could be developed would result in as little economic dislocation as had been experienced under the invalidated definition. The best available criteria for delimiting exterritory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises con cerned with agricultural commodities and more or less near their production," and for distinguishing between "rural agricultural" and "urban industrial" conditions in accordance with the intent of Congress were found to be: (1) the distances from which the enterprises obtained the commodities on which they per formed the operations named in the statute; and (2) the pature of the community in which they were located, as judicated generally by a population test

A definition of varea of production, employing such population mileage, criteria had been so effect for a period of more than a year prior to October 1, 1940. This definition included within the area of production any individual performing the specified operations, con materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the

open country of in a rural community. Linguistical locality, was limited to distances of not usure that to miles, and Topen country or rural community. We defined so as to exclude any town or city of 2500 or preater population according to the last available timed States Census. This definition was abandoned in favor of the definition containing an couplexee limits from when industry representatives profested that it resulted, in numerous competitive inequalities and economic discriminations between establishments to cated within the Tarea of production, as so defined, and those outside the Tarea of production.

Tests based on distance and population were the lases of all but one of the definitions proposed for discussion at the hearings. An offern live proposal for fruits and vegetables abstituted for the mileage of terion the requirement that the establishment must be located in a county in which the total of the acreage half sted in all truits and vegetables is 20 percent or more of the crop land harvested. It was not feasible flowever, to detelop suitable criteria of this type for other commodities. Such a test, moreover, did not appear to take into account some of the economic factors involved in defining the area of prediction. For these reasons, and because of other considerations, the definitions proposed for hearings held subsequent to the one for fruits and vegetables did not contain similar proposals. It was thally decided not to use this criterion as a part of the definition, but to take account of the economic factors reflected by such a test in selecting the pertional militages for each group of commodities.

The definition of "area of production" property in the notices of hearing for the different connectities were drawn with a view to carrying out insofar as possible the following objectives: (1) to distinguish generally between establishments operating under "rural agricultural" conditions and those subject to "urban industrial" conditions: (2) to indicate for each agricultural commodities or ground agricultural commodities which would be deemed to be more or less near, the production of the particular agricultural commodity. Efforts were also directed toward eliminating insofar as possible within the frame

work of the congressional intent and the economic and legal considerations involved, the most serious criticisms of the previous definition which had employed population and indeage as criteria for exemption:

One of the most frequently urged of the objections to the "40 mile 2,500 population" definition had been that by failing to treat all stablishments alikes by denving the exemption to all of them or exempting them all it placed some establishments at a competitive disadvantage with respect to others. Such dis erimination, however, seems to be inherent in the.; statute itself, which did not exempt all employees in the industries involved, but only those employed "within the area of production." It is apparent that only a definition which would have the effect of exempting all or none of the employees would entirely avoid this discrimination. That such a definition would be invalid is evident from the statement of the Supreme Court, in the Holly Hill case that "in hold that all individuals tengaged; in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter, or other dairy products' are exempt from the operation of the Act is obviously. to fly in the face of congressional purpose. The Act exempts some but not all of the employees engaged in these industries It is obvious therefore that some discrimination, in the sense that some establishments will not meet the test for exymption, must inevitably result from any valid definition. 1.

Although this could not be taken into consideration in formulating the definition it was apparent from the obsidence presented at the hearings that such discrimination had become largely academic in nature. Representatives of industry after industry testified that the minimum wages paid exceed the minimum correctly required by the Fair Labor-Standards Act and that consequently the industry would not be required to increase wages by reason of failure to quality for exemption under section 13(a) (10). There was testimony to the effect that the establishments concerned would incur some cost for exemption if they failed to qualify for exemption. However, it was clear that relatively few establishments could take full

The definitions proposed for consideration at the hearings, while adopting population and distance from which commodities are received as basic criteria for . exemption, which included modifying factors, were designed to reduce the impact of discriminations that had resulted from the "10 mile, 2.5/0-population" de in tion previously in effect. The 2,500-population test was retained in the definitions proposed for discussion at. the hearings despite previous objections to it because it came closer to accomplishing the objective for which it is intended than any other known test and because it has been the dividing line between rural and urban communities used for many years by the Bureau of the Gensus and other agencies of government. One serious objection related to the competitive discriminations which arose in cases where plants located within the . city limits of a town of more than 2,500 population were not exempt, while some of their competitors who hap. pened to be located across the boundary line of the same town were exempt. In many instances, it could obvionsly not be said that the boundary of the town marked the dividing line between establishments operating under rural rather than urban labor conditions. Instead it appeared clearly that the influence of the town on the market for labor, as well as on wage levels and related conditions, extends for some distance into the sur rounding area. To minimize the discriminations resulting from this particular type of competitive situation, the definition of the terms "open country" and "rural community" in the proposed definitions included areas surrounding the towns as well as the towns. For purposes of the hearings the size of the surrounding areas

advantage of the overtime exemption provided in the 'area of production' sections of the Act, in view of the unionization which had taken place in the last few years and the fact that most affected industries have 14 weeks, 28 weeks and insome instances year-round exemptions from exertime infect other provisions of the Act. Rising wage faces and the spreading practice of paying premium rates of evertime since the hearings have rechieved even turther the number of establishments that educt derive any material benefit from either the minimum wage or overtime exemptions provided for plants in the area of production

assumed to be within the influence of the urban community and hence extended from the definition of rural community or open country ranged from 3 miles to 21, miles depending upon the population of the town or

city.

The objections to 10 miles as a universal distance denoting nearless to source of supply were also recognized in the proposed definitions by (1) Sarving the allowable distances on the basis of population density for some commodines, permitting greater distances in the more sparsely populated areas and shorter distances in the more thickly populated areas; and (2) increasing permissible distances for most commodities to mileages believed to be more consistent with the drawing radius of plants operating within their own producing areas, while at the same time giving due weight to the many "complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricul tural commodities and more or less near their production." Thus, in addition to the other requirements. mileages varying from ten miles for some agricultural commodities under-ertain conditions to as much as 50. miles for other commodities were proposed for consideration at the hearings.

Another objection to the previous "population-mile-age" definition was the requirement that all of the commodities received by the exempt establishment had to come from farms within the specified distance from the establishment. As a result of this requirement, it had been pointed out, a farmer located in an area remote from an exempt plant might be deprived of the opportunity of marketing his products, since the exempt establishment would lose it exemption if it handled his crop. The validity of this objection was recognized in the definitions proposed for discussion at the hearings by including a provision permitting 5 percent of the commodities to come from beyond the specified mile-ages without defeating the exemption.

Alternative proposals submitted at the hearings or in post hearing briefs by employer organizations were quite generally designed to exempt all or practically all establishments in the particular industry or branch

of the bustey represented. In general, the implayer proposed definitions did not differentiate between rural agricultural and urban industrial conditions. A mini bet of the propositis, moreover, were of at least doubt tal legality when considered in the light of the majority opinion in the Holly Hill case. One type of definition proposed by andustry representatives would have had the effect merely of striking the words tarea of production" from the Act. Others merely named all the counties in which any appreciable amount of the commodity is grown. These proposed definitions would have exempted everyone engaged in the named operations with possible exceptions in instances which seem to be extremely rare. Some organizations adopted the general criterion of distances from which commodities are received, but proposed mileages so broad as to include all establishments within the exemption. One novel but fardly igacticable proposal was made that thy Administrator refrain from defining area of production, leaving the question to be decided by the courts in each individual instance.

Some labor representatives on the other hand proprosed definitions which they admitted frankly were designed to deny the exemption to all but a very few establishments. One proposal make by labor representatives adopted the population mileage criterion, but restricted the area from which the establishment could draw its commodities to 5 miles, and included within the exemption only establishments which were in the open country or in rival communities with populations of less than 500, and which had annual sales of Jess than \$20,000. One laber organization proposed that 500 population and 2 wile he the test. Another labor proposal would have required the Administrator to determine in each individual east whether the establishment was in the area of production and would have made the tests. for exemption so restrictive that probably no establish ment could have qualified

The objections to the definitions proposed for discussion at the hearings were in general directed to the fact that they would result in discriminations because they did not have the effect of exempting all or a sufficiently large proportion of the establishments in a particular

inclustes or part of an industry represented at the hear ing. Much of the testimony at the hearings was directed to showing that particular establishments or groups of establishments in one or another sections of the counwould not qualify for exemption under the jule nosals contained in the notices of hearing. The real ions why, such effects are inevitable under any valid definition have been indicated above, and no valid method of completely eliminating them appears to be possible. To the extent possible within the legal and economic limitations of the problem, the criticisms and suggestions which had merit have been taken into consideration in formulating the final definitions.

That portion of the proposed definitions, which defined "open country" or "rural community" in terms of a population of less than 2,500 was also attacked. It was irgued by some that the population of a community docnot determine whether it is agricultural or industrial in character, and examples were cited of towns of more. thin 2,500 which were said to be predominantly agricultural in character, and of towns of less than 2,500 which were obviously industrial. However, no better criterion for accomplishing the objective of distinguishing establishments' subject to : 'urban-industrial' conditions from those under the influence of "rural-agricul conditions was developed at the hearings. dependent investigation by the staff of the Wage and Hour Division as well as consultation with experts of the Department of Agriculture and other Government bureaus, moreover, failed to develop any administra tively feasible substitute for population as a test of urbanization and industrialization. In the course of the investigation and study of this problem, consider. aften was given to a number of such possible alterna tives to the population test as the major source of income of the town (e.g., whether agricultural or industrial) and various types of criferia indicating the extent of industrial employment in relation to employ ment in the handling and processing of agricultural commodities, but all were found to be impracticable and were Mandoned. An analysis of all the available data indicated, however, that while the size of a town is not a perfect criterion of its urban or industrial

character, it is nevertheless the best available test, and leads to results high in general ard accurage country.

to warraful its indoption

. Even those who corbotal the property of using population lest to distinguish affants operating und "rural agricultural" eather than "tuchan suchasteial" 2.500 was not the prophe dividing like. Benresentative of industry attacked the figure 2500 as non-small, while labor representatives insisted that it was top large Examples were given of communities with population considerably in excess of 2,500, in which, it was contended, labor conditions were not different from those in towns of his than 2,500. Examples were cited of towns of larger population than 2,500 which were said to be predominantly "agricultural" in the sense that they were dependent upon the surrounding agricultural areas for their economic existence and the junctiful activities were related to the handling or processing of agricultural commodifies or of otherwise serving the farmers in the surrounding community. Representatives of employer groups advanced fromosals that the population line be drawn at various figures canthe natto 100,000 or more. Some employ retappesents. tices suggested that Ink terminal or market cities be excluded from the area of production. At the other Atrème, labor representatives pointed to the wide spread industrialization in towns of less than 2500 and proposed that establishments be considered outside the "area of production" if they were located in commit nities with populations in excess of 500 persons.

An analysis of the proposals advanced by representatives of employer groups at the hearings as substitutes for the proposed 2,500 population test, inficates that in most instances they were designed to except all or practically all of the establishments represented by the particular group making the proposal. While the 2,500 population test was criticized by our player representatives because it excluded some towns of larger population which were said to be agricultural in character, the alternatives proposed by them would have faid the equally objectionable effect of including within the area of production an even greater number

of charly redustrial towns. The proposal of labor rep. re-attitives that the dividing line be drawn at communetokicith populations of 500 persons would have exbudge all of the urban industrial communities from the area by production, but would also have excluded a dispropertionate number of truly rural and agricultural.

It Seems reasonable to conclude from the record and all the available evidence that the tests proposed at the hearings as substitutes for the 2,500 population criterion ard subject to at least as many objections as have been levied against the 2,500 population test. Although it is clear that any line attempting to distinguish be-'ween "urban industrial" and "rural-grienfineal" communities on the basis of population can at best the only an approximation, it is equally clear that hone of the proposals advanced at the hearing would accomplish the objectives of such a test with as much accuracy as the 2,500 population test. As a class, places of 2,500 population or more are predominantly industrial: while places with populations of less than 2,500 are predominantly agricultural. A population limit of 2,500, moreover, bas for over 35 years been the official dividing the between "rural" and "urban" employed by the Bureau of the Census in its studies. This dividing line has also been accepted and used in studies made by the Bureau of Agricultural Economics, the Federal Emergency Relief Administration, the Works Progress Administration and other government agencies. It has furnished the definition of "rural" communities which has been the basis of studies of rural and urban comtounities by thany sociologists. It has been incorporated rate statute by the Congress of the United States in special legislation for rural communities." To a very great extenti the handling and processing of agricul-

¹ See, for example, 30 Stat. 356, 40 Stat. 1189, "an fact mopropriating finds for the construction of rural post boads. In the other hand the Baral Electrification Act of USCA Sec 113) defines rural area, as 'any area of the United

tural and horticultural commodities is carried on in the open country or in towns of less than 2,500. For example, only about 10% of grain elevators are located in towns of 2,500 or more. Only about 11% of cotton gins are located in such populated places. About two-thirds of all fresh fruit and vegetable canning and packing, cheese ganufacturing and poultry and egg assembling are carried on in the open country or in towns of 2,500 or less.

On the basis of all the evidence, it is my conclusion that a population test of 2,500, while not drawing a line between "urban-industrial" and "trural agricultural" conditions with a fine precision, will come as close to accomplishing this objective as it is possible to come in a general rule applicable to many situations.

Objections were also voiced at the hearings against those portions of the proposed definitions which excluded from the area of production establishments to cated within specified distances of population centers, the distance increasing with the population of the city or town. Under the proposed definitions, establishments were excluded from the "area of production" if they were located within 3 miles of towns with popul lations between 2,500 and 10,000, 6 miles from towns of 19,000 to 25,000, 10 miles from cities between 25,000 and 100,000 and 20 miles from cities of 100,000 population or more. One purpose of this requirement, it will be recalled was to meet one of the objections raised to the "10-mile 2.500 population" definition which had previously been in effect; that it frequently discriminated against employers located within the limits of the town while giving a competitive advantage to employers who moved their establishments just beyond the boundary in order to avoid paying municipal taxes or for other reasons. It was apparent, moreover, that the influence of an arban community does not end at the political, houndary, but extends for some distance beyond it into the surrounding area. The distance over which this

This has long been recognized by the Bureau of the Census in its denarcation of metropolitan districts to include certain solited areas configuous to cities. A district of this type, the Bureau found "tends to dear more or less integrated area with

influence extends depends upon a variety of factors, but. s related with a fair degree of accuracy to the popula tion of the city. The rationale for such a test appears to have been supported by the facts, which indicated that it would tend to eliminate competitive discriminations of the most serious kind, by excluding from the "area of production" establishments which are subject to "urban industrial" labor conditions although not located within political boundaries of cities or towns. The testimony at the hearings judicated, how ever, that the distances specified in the proposed definitions were greater than was necessary to accomplish the desired purpose, since they had the effect of disqualitying some establishments which were too far away from the town to be within its influence. Consus data on metropolitan districts and other available information, moreover, tended to support this testimony The evidence indicated that the urban influences tended to extend roughly one mile outside of the limits of cities with populations between 2,500 and 50,000, three miles from cities between 50,000 and 500,000, as five miles from cities of 500,000 or over. The definition of "area of production" which has been adopted therefore excludes establishments located within such distances of cities, towns or urban places with the specified populations. These distances tend to reflect the direct in fluence of the urban community upon the surrounding.

The Congressional purpose of restricting the exemption to establishments located "more or less near" the production of the agricultural commodity has been recognized in the definitions of "area of production" adopted since the effective date of the Act. The test of common economic, social and often administrative interest. Serious consideration was given to the adoption of surrounding areas of these metropolitan districts in lieu of the hands proposed at the hearings. This was abandoned in favor of specific mileage bands however, because the areas included within these metropolitan districts reflect the influence of some factors which are not perfinent to the problem of defining "area of production" and also because no data are available with respect to metropolitan districts for cities of less than 50,000 population. See Conses at Population 1949.

"area of production" issued in October 1938; in the agricultural or horticultural commodities "from faries in the immediate locality." Special definitions for dry edible beans and for Paerto Riean leaf tobacco recog nized this principle in the requirement that the exemp tion apply only to employees at the place where these products were first assembled from nearby farms. A later definition for fresh fruits and vegetables defined the term "immediate locality" more specifically in terms of a distance of 10 miles or less. In 1939, "in mediate locality" was broadened to "general vicinity." but no exact definition of the term was included within the regulations defining "area of production." Court decisions holding parts of the definition of varea of production" to be invalid did not upset that portion el the definition which required that all commodities come from "the general vicinity" of the establishment is order that the employees qualify for exemption. The provision of one of the previous definitions restricting the distance to 10 miles and requiring that all of the commodities come from within that distance seems to have been approved as valid by the United States So preme Court in the Holly Hill case. Thus the courtappear to have sustained the validity of employing a test that related the proximity of the establishment to the farms producing the commodities it landles.

Nevertheless, the use of a mileage criterion was opposed by some groups at the hearings, particularly those having members who did not operate entirely within one producing area but reached out over great distances; to obtain the materials needed to operate their plants. Other groups argued that a mileage criterion could be employed only if it were great enough to include all establishments. For example, the copresentative of the cotton compressors opposed the use of a rolleage criterion, pointing out that many compressoperators seceive their cetton from very greats distances, and taking the position that a cotton compress should be entitled to the exemption even it it received cotton from a toreign country. The representatives of

the total corredicting industry also opposed acquileage erite for unless the mileage used was a clarge figure. The sumony disclosed that some vertiving plants located in the tobacco growing region of North Carolina receive tobacco for redrying from producing areas in the State of Georgia. Consequently, this group was opposed to any mileage test which would not exempt North Carolina plants reaching into Georgia for their tobacco.

An analysis of the available data indicates quite clearly that the longest hauls of agricultural or horticultural commodities normally occur when the commodity is moved to an establishment which has not been located principally to serve the nearby farms, but for reasons involving nearness to terminal facilities. markets, labor supply on other such considerations. The most striking instances of this kind of establishment are the larroccotton compresses located in cities having s port facilities which are principally established there for convenience in handling cotton for water transportation and the export trade: Such compresses reach out over handreds of miles for the cotton handled by them, and, incidentally, generally operate in large cities under urban industrial conditions. Their relationship to the farmer and to agriculture is consider ably more remote, for example, than that of the cotton gin; the warehouses, and even the inland compresse-Some establishments in other industries or branches handling agricultural commodities also reach out be youd their immediate producing areas and obtain greater or lesser amounts of the commodity they havelle from other producing areas. The number of such establishments varies with the different commodities or in dustries and may vary in different sections of the cour try and from time to time

The distances from which establishments receive their commodities reflect to varying degrees the influence of significant economic factors, many of which are pertinent to the complex task of determining the kinds of establishments that should or should not be exempt from the minimum wage or overtime provisions of the Act. Consequently, one of the major tests adopted for delimiting the zone within which the polyment eco-

notice influences may be deemed to operate and outside of which they lose their force, is the distance from which establishments in the various industries receive the conimodities upon which they perform the operations specified in sections 7(e) and 13(a)(40) of the Yet

The selection of appropriate distances for the different commodities and groups of commodities has been no easy task, and was accomplished only after carefully weighing and synthesizing a large variety of complicate I economic factors. Among the many factors taken into consideration were the following: the kind of crop; the distances from which the establishments in each industry receive the agricultural or horticultural commodities upon which they perform the operations specified in the pertinent sections of the Act; the geography and topography of the various sections of the country in which the different commodities are normally produced; the location of the plants within these areas; the concentration of cultivation of the different commodities in various sections of the country; the pattern of concentration of agricultural production with respect to the location of the establishment; differences in practice as between single crop areas and diversified farming areas; the perishability of the commodities received; the extent to which the plants deal with a single commodity rather than a variety of commodities; the nature of the operations performed on the commodities received, including the degree of in dustrialization of the various operations; the number of hands or operations through which the particular commodity has moved since leaving the farm, including the possibility of passing increased labor costs back to the farmer; the marketing practices of the particular industries; and the wage rates paid, and over time practices, in the various communities concerned with particular commodifies.

On the basis of all the evidence, it is my conclusion that the operating distances which may be considered "more or less near" the establishment with respect to particular industries or commodities and which (to the extent that this can be accomplished by a distance test).

most nearly delimit the zones within which the pertinent economic influences operate, are as follows:

(a) the ginning of cotton 10 miles:

(b) all operations on fresh fruits and vege-

tables 15 miles;

(c) the storing of cotton and any operations on commodities not otherwise specified 20 miles;

(d) the compressing and compress wavehousing of conton and operations on tobacco (except Puetto Rican leaf tobacco¹) grain, soybeans, poultry or eggs—50 miles.

In acriving at these distances the weighing of the many factors had to be accomplished with the best data available for the particular industries. Some grouping and averaging was necessary, moreover, since it was not feasibile to develop one or more separate distance requirements for each of approximately 300 affected commodities. It is my considered opinion, nevertheless, that the distances specified in the definitions will in general accomplish the required objectives.

Complicating the task of determining the appropriate distances from the establishments to the farms on which the commodities were produced was the fact that some of the operations, specified in the statute are two or more stages removed from the farm. At each successive stage at is increasingly difficult to identify the farms on which the commodities had their origin. At each successive stage, moreover, the commodities may be expected to be further removed from the farms on which they were grown. Some allowance was made for these factors in selecting the particular distances applicable to each commodity or group, of commodities. It was also found necessary; however, to detadon some method of making reasonably sure that commodities which are received from other handiers or processors rather than directly from farms

The definition of the "area of production" of Purito Rican leaf tobacco involves a number of very complex special problems, which make it desirable to consider that commodity equation (topsequently, the previous definition will be left in effect until such time as a separate hearing on be held with respect to it.

were produced on firms more on less long the estade listiment. This night be approximated by a vigin ties came bust also be orderating within the tapon of . cable to establish such a requirement in the action difficulty of a scorp integrate thets regarding the operations of the supplying establishments. Available evidence indicated, however, that the supply in establishments which were located in the open countrious commodities from meanly farms than establishment not so located. The 'distance' test was therefore drafted in terms of receipts from Phormal Tural certain other establishments as well as farms. Thus, the receipt of commodities in accordance with this test may be established howing that the commodities were received from any of the following sources within the specified distances: (1) farms; (2) farm as semblers or other customary supplying establishments. (ii) located in the open country or in a rugal community. or (b) not located in the open country or in a rural community provided it is shown that the commodities actually originated on farms within the specified disfances from the establishment claiming the exemption.

A tolerance of 5°, has been included in the definition in order to allow the exemption to apply despite receipt of an occasional shipment from a remote farmer or from an urban source, or a source which can not for one reason or another be determined. This folcance applies to the total combined receipts for the period to ed. An establishment may therefore qualify even if the receipts of one or more communities from disqualifying sources or distances exceed 5°, provided that the total receipts from disqualifying sources or distances or distances of the total receipts from disqualifying sources or distances of all combinedities.

The period for determining whether 95% of agercultural or horticultural commodities are received from normal rural sources of supply within the specified distances will ordinarily be the last preceding calcular month of operation in which the establishment has operated for at least two workworks. In the case of establishments, performing the specified operations on the particular commodities for the first time, the period will be the total time during which the establishment has so operated, natil the required enemiar month of operations has clapsed. The preceding calendar month is considered to be the most practicable period for applying the test. It provides a more stable basis for the test than a weekly period, set will reflect the nature of current operations with much greater accuracy than would the preceding calendar year, which was the period contained in the definitions proposed for the hearings.

On the basis of the considerations discussed above, it is my conclusion that the definitions of "area of production" which will best carry out the objectives of Congress as indicated in the legislative history of sections 7(c) and 13(a)(10) of the Fair Labor Standards Act, and which, to use the language of the Supreme Court, will accomplish the appropriate "delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near

their production," are as follows:

"Area of Production" as used in Section 7(c) of the Fair Labor Standards Act.

- (a) An employer shall be regarded as engaged in the first processing of any agricultural or horticultural commodity during seasonal operations within the "area of production" within the meaning of Section 7(c) if he is so engaged in an establishment which is located in the open country or in a rural community and in which such first processing is performed on commodities 95% of which come from normal rural sources of supply located not more than the following air line distances from the establishment:
- (1) with respect to grain, soybeans, eggs, or tobacco-(other than Pherso Rican leaf tobacco) 50 miles; (72) with respect to any other agricultural or borti-

The special definition for Puerto Riean leaf tobacco is not set out two since no change has been made. See note page 12, supra

cultural commodities 20 miles.

- (b) For the purposes of this regulation
- the 'Check country or raral community' shall not include any city, town or urban place of 2,500 or greater population or any area within
 - olo air line mile of any city, town, or mban place with a population of 2,500 upsto but not including 50,000 or
 - Three air line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000 or
 - five air line miles of any city with a population of 500,000 or greater.

according to the latest available United States Census.

(2) The commodities shall be considered to come from 'normal rural sources of supply' within the specified distances from the establishment if they are received (i) from farm swithin such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily niones, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

- (3) The period for determining whether 95% of the agricultural or horticultural commodities age received from normal rural sources of surply shall be the last preceding calendar mouth in which operations were carried on for two workweeks or more, except that until sold time as an establishment has operated for such a calcular month the period shall be the functioning which it has been in operation.
- (4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different sommodities received in the establishment are enstomable measured in pays ical units that are not comparable.

"Area of Production" as used in section 13(a) (10) of the Fair Labor Standards Act

- (a) An individual shall be regarded as employed in the Tarea of production" within the meaning of Section 15(a)(10) in handling, packing, storing, gianing, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or hortifulling commodities for market, or in making cheese or butter or other dairy products:
- (1) if the establishment where he is employed is located in the open country or in a rural community and. 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:
 - (i) with respect to be ginning of cotton 10 miles:

.. (ii) with respect to operations on fresh fruits and vegetables 15 miles:

(iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection 20 miles:

(iv) with respect to the compressing and compresswarehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, sevbeans, poultry or eggs -50 miles.

(b) For the purposes of this regulation:

- (1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within
 - one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 of
 - three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or
 - fore, air line ludes of any city with a population of

according to the latest available United Styles Courses

12) The commodities shall be emisidered to come from 'normal rural sources of supply's within the pecified distances from the establishment it they are received 11 from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 9% percent of the commodities are received from normal_rural sources of supply shall be the last preceding calcidar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calgudar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dellar value shall be used if different compodities received in the establishment are enstomatily measured in physical units that are not comparable

In concluding this explanation of the considerations entering into the definition of the area of production. I want to make it clear that I am far from satisfied with the definition since employers engaged in the same activities and employees engaged in the same type of work will have unequal rights and obligations under the Agt. Such results are unfortunately anavoidable since they arise from the language and theory of this section of the statute itself. In drafting the section of the Act dealing with "area of production" Congressibility and define the exact scope of the exemption, and delegated the task of defining it to the Administrator.

It is clear that Congress intended to exempt only those establishments performing the specified opications within the area of production, while leaving within the scope of the minimum wage and overtime progrishers of the Act those establishments performing the same operations outside of the area of production, and consequently that some economic discrimination as between establishments within the exemption and those outside of it was also within the intent of Congress. I am frank to say that this economic discrimination leading only to competitive inequalities is not only administratively very difficult but basically unfair and seems to me unsound public policy. Since the previous definition which to a considerable degree minimized these inequalities has been held invalid it is obvious that the only satisfactory solution is a legislative revision of sections 7(e) and 13(a) (10) of the Act. I have elsewhere indicated my views on this and I have the Congress will take quick action. In the meaning I can only do my immediate duty in carrying out in scientionsly to the best of my ability the mandate laid upon the by the Congress.

(S.) L. MERCHER WALLS

December 18, 1946

LIBRARY SUPREME COURT, U.S. JAN 13 1956

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No. 278

In the Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITOFELL, SECRETARY OF LABOR, UNITED STATES DEPAREMENT OF LABOR, PETITIONER

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, Co-Partners, Doing Business as J. T. Budd, Jr., and Company, King Edward Tobacco Company of Florida, and May Tobacco Company

ON WELT OF CERTICEARY TO THE UNITED STATES COURT OF APPRAIS FOR THE PIFTH CIRCUIT

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INDEX

Page
Opinions below 1
Jurisdiction 2
Questions presented. > 2
Statute involved 53
Statement 3
Summary of argument 14
Argument 20
I. The Wage and Hour Administrator's redefi-
nition of 'area of production' pursuant to Section 13 (a) (10) of the Fair Labor
Standards Act is Valid. 21
A. The definition accords with the stat- utory terms and this Court's
decision in Addison v. Holly Hill;
and is restricted to geographic
criteria which take into account,
insofar as consistent with the
drawing of geographic lines, the 3
relevant economic factors
B. Congress has, in effect, approved the
Administrator's definition 32
II. Irrespective of the validity of the definition
of 'area of production," respondents'
bulking plant employees do not meet the
other requirements for exemption ander
Section 13 (a) (10) because the processing a
operation in which they are angaged is not
one of those specified in that section and
is not limited to "agricultural or horticul-
tural commodities" 36
III. The Section 13 (a) (b) agricultural exemp-
tion, admittedly inapplicable to respond-
ent Budd's plant, is also mapplicable to
the offsthe-farm bulking plant operations of respondents King, Edward and May
because the bulking process is not "agri-
culture" as defined in Section 3 (f) 59
current as afamen in carrier of the St.

600				
	011	icil	1-1	4111

Page	
59	

CITATIONS

ses:
Addison's Holly Hill Co., 322 U.S. 607 11.
12, 13-14, 15, 22, 23; 24, 27, 28, 29; 30, 36
Alstate Constitution Co. v. Durkin, 345 U.S. 13 14, 35 .
Bowie v. Gonzalez, 117 F. 2d 11% 46, 48
Farmers Reservoir & Irrigation Co. v. McComb.
337 U. S. 755
Flembig v. Farmers Peanott Co., 128 F. 2d 404
Jenkins v. Durkin, 208 F 2d 941 23
Manija v. Wasalya Agricultural Co., 349 U. S.
254 14, 16, 17, 18, 19–20,
35, 37, 40, 45, 46, 50, 51, 52, 53, 54, 55, 58, 59
Phillips Co. v. Walling, 324 U.S. 490
Powell v. United States-Cartridge Co., 339.1. S.
497
Puerto Rico Tobacco Marketing Coop Ass'n V.
McComb, 181 F. 2d 697
Securities and Exchange Commission v: Central-
Illinois Securities Corp., 338 U. S. 96 31
Securities and Exchange Commission v. Chenery
Corp., 332 U. S. 194
Stratton v. Farmers Produce Co., 134 F. 2d 825
Tobin v. Traders Compress & p., 199 F. 2d 8, certi-
orari denied, 344 U. S. 909
Unemployment Compensation Commission v. Ara-
gon, 329 U.S. 143 31
Wyatt v. Holtrille Alfalfa Mills, 106 F. Supp. 624.
reversed and remanded, 12 W. H. Cases, 635
atutes:
Fair Labor Standards Act of 1938, c. 676, 52
Stat \$1060, as amended, c. 736, 63 Stat. 910
(29 U S. C. 201):
Sec. 3 (f) 18, 43, 50
Sec. 7 (b) (3) 45
Sec. 7 (c) 16, 17, 21, 41, 45, 46, 47, 48
Sec. 13 (a) (b) 166 8, 21, 37, 42, 44, 50
Sec. 13 (a) (10) 11, 15,
16, 17, 18, 20, 21, 36, 37, 40, 41, 44, 45, 47, 48
Sec. 17

Statutes Continued	Page
Fair Labor Standards Ame	hdment's of 1949, 63
Stat. 910 Sec. 16 (4).	14, 18, 35, 49
Portal-to-Portal Act of 1947	7 Sec. 12, 29 U.S.C.
251, 261	* 35
Miscellaneous:	
Administratoi s regulation	saughting "Area of
of Production As Used in	TO SECURITION OF THE PROPERTY
Fair Labor Standards	
. 1948, 13 F R 7347	49
1948 Annual Report of the	Wage and Hour and
Public Contracts Division	, pp. 123-134 33
. 1950 Annual Report of the	Secretary of Labor.
pp. 281-285	31
Area of Production: Tobacco	o. United States De-
partment of Labor, Wage	
Contracts Divisions (Dece	
3 CCH Labor Law Reporter	(4th ed.) par. 23, 281 49
29 CFR Ch. V. § 536 2	
81 Cong. Rec.	
Pp. 7656-7657	51e
Pp. 7656-7658, 7660 Y	41
P. 7876	15:
Pp. 7876-7878, 7949	
Pp. 7877-7878	39
P. 7878	· 16
Pp. 7878-7879	42
P. 7879	44
Pp. 7879-7887	42, 45
P. 7887	
82 Cong. Rec	
P. 1783	43
Pp. 1783, 1805	14
Pp. 1785, 1806	45
Pp. 1804-1805	433
P: 1806 83 Cong. Rec.:	43
P. 7401 - 48	1
Pp. 7408-7710	• 46
P 7421	4.1
P. 7428	45
Pp. 7428-7429	44
the test that .	43

iscellaneous Continued	Page
95 Cong/ Rec. 12435-12436, 12583	34
95 Cong. Rec. 14933	- 34
Findings of the Administrator, December 18,	
1946, 3 CCH Labor Law Reporter, par. 23,282.	. 25,
And the second s	26, 28
Findings of the Administrator, 19 F. R. 4482	26
Hearings before the House Committee on Educa-	
tion and Labor on H. R. 2033, 81st Cong.,	
1st Sess. (1949):	
P. 56	. 33
Pp. 872-887, 912-945	33
" Hearings before Subcommittee No. 2 of the	
Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 584	
sentatives, 80th Cong., 1st Sess., on H. R. 584	
and H. J. Res, 919 pp, 210-221	. 34
Hearings before a Subcommittee of the Com-	
mittee on Labor and Public Welfare on S. 42,	
S. 154, S. 160, S. 161, S. 557, S. 731, S. 1048,	
S. 1076, S. 1288, S. 1400, S. 1104, S. 1509, S.	
2062, and S. 2386, 80th Cong., 2d Sess. (1948);	
op 40-42, 82-83, 165	33
Hearings before a Subcommittee of the Com-	
tee on Labor and Public Welfare on S. 58, S. 67.	
S 921 S 105, S 190, S, 248, and S, 653, 81st.	
Cong., 1st Sess. (1949), pp. 658-705	32
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Manual, 1940, p. 180, pars, 20, 25, 32 and 33	.45
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mittee on Education and Labor and the House	
Committee on Labor, June 2, 1937 to June 22,	1.
1937, p. 1096	
Release M 12 of Wage and Hour and Public	
Contracts Divisions, "Area of Production" As	
It Applies To Tobacco Industry (Feb. 28, 1947)	
Report and Recommendations of the Presiding	2.
- Officer, administrative hearings 1951	-
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As reported by Senate Committee, July 8, 1927	7

Miscellaneous Continued .	
S. 2475, 75th Cong., 1st Sess. Continued	Page
"As passed by Senate July 31, 1937, 81st Cong.	
• Rec. 7957	40
As reported to the House, August 6, 1937, in	
H. Rep. No. 1452, 75th Cong., 1st Sess	41.
House Confidential Committee Print of Nov.	. / .
26, 1937, 75th Cong., 2d Sess., Sec. 2 (a) (9)	. 41
House Confidential Committee Print of Dec.	
7, 1937, Sec. 2 (a) (20)	41
. House Committee Print of Dec. 14, 1937, Sec.	
2 (a) (20)	41
As recommitted to the House on December 17.	
1937	41
S. Rep. No. 640, 81st Cong., 1st Sess	33
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lar No. 249, American Tobacco Types, Uses,	
	38, 56
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETERSINER

Joseph T. Bedd, Jr., and Florence W. Budd, Co-Partners, Doi & Business as J. T. Budd, Jr., and Company, King Edward Tobacco Company of Florida, and May Tobacco Company

ON WRIT OF CERTIONARI TO THE TAITED STATES COURT OF APPEALS FOR THE FIFTH CIRCLIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the District Court (RK 55; RB 145) is reported at 114 F. Supp. 865. The opinion of the Court of Appeals (RK 89; RB 159) is reported at 221 F. 2d 406.

¹⁸ RB" references are to the Record in Budd, while "RK" references are to the Record in King Edward.

The judgments of the Court of Appeals (RK 96; RB 166) were entered on April 15, 1955. By order of Mr. Justice Black, dated July 8, 1955, the time for filing a petition for a writ of certiorari was extended to and including August 1, 1955 (RK 96; RB 166). The petition for a writ of certiorari was filed on July 29, 1955, and was granted on October 17, 1955 (RK 97; RB 167). 350 U. S. 859. The jurisdiction of this Court rests on 28 U. S. C. 1254 (195

QUESTIONS PRESENTED

- 1. Whether the regulation of the Administrator of the Wage and Hour Division, defining "area of production" pursuant to Section 13 (a) (10) of the Fair Labor Standards Act, which provides exemption from both minimum wage and overtime requirements of the Act for employees engaged in specified operations "within the area of production (as defined by the Administrator)," is valid.
- 2. Whether employees of tobacco bulking plants are engaged in the specified operations on agricultural or horticultural commodities to which the exemption provided by Section 13 (a) (10) applies.
- 3. Whether off-the-farm employees employed by respondents King Edward and May in tobacco bulking plants engaged in the same processing operations as respondent Budd, except that they

process only tobacco grown by the processor whereas Budd processes tobacco grown by numerous small farmers, are employed in "agriculture" within the meaning of Section 3 (f) of the Fair. Labor Standards Act, and are therefore exempted by Section 13 (a) (b) from the minimum wage and overtime provisions of the Act.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, e. 676, 52 Stat, 1060, as amended, e. 736, 63 Stat. 910 (29 U. S. C. 201, et seq.), and the pertinent administrative regulations (29 CFR, Ch. V. § 536.2) and administrative findings are set forth in the Separate Appendix (hereafter cited as Sep. App.), pp. 1-3, 4-40.

STATEMENT

These actions were brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the minimum wage and record keeping provisions of the Act. The employees involved work in tobaccobulking or processing plants operated by the three

The petition for certiorari also included among the questions presented the applicability of the Section 13 (a) (b) exemption to the employees of respondent Budd. While Budd claimed the Section 13 (a) (b) exemption in its answer (RB 11, 45–26, 40) and fully briefed the claim to this exemption in the court below (Br. of Appellant Budd, pp. 12–25, 34–40), it has now abandoned reliance on this exemption. See page 5 of Brief for Respondents in Opposition to the Petition for Certiorari. This question has been rephrased accordingly;

respondents in the town of Quincy, Florida (RB 1-2, 4, 146; RK 1, 4, 37-38, 40, 67-68), and respondents claim that these employees are exempted from the wage provisions of the Act.

1. Respondents' processing operations relate to U. S. Type 62 Sumatra tobacco which is a leaf tobacco grown and used exclusively for cigar wrappers (RB 41, 48; RK 6). Type 62 requires a special kind of cultivation, and curing (RB 41, 56; RK 6-10). It is grown in fields completely enclosed and covered with cheesecloth shade. When each leaf of tobacco reaches a certain state of maturity it must immediately be harvested through a process known as "priming." lower leaves are picked first, perhaps two or three from each tobacco stalk. This picking is repeated as the tobacco matures until the operation has been repeated six or seven times. At each priming, the tobacco is immediately taken into a tobacco barn located on the farm, where it is strung on sticks and dried by means of heat. When the tobacco is almost completely dried, the drying process is interrupted and the tobacco is permitted to absorb moisture and again dried (RB 147, 148). The drying process is repeated until the tobacco has reached a stage in the process of curing when it is ready for the bulking plant involved in this case (ibid.). All the tobacco goes through this drying and redrying treatment in the barns before it reaches the bulking plant. Although some fermentation begins

at this stage, the treatment in the barns is essentially a simple drying operation during which the moisture content of the tobacco is decreased from between 85°, and 80% to between 25% and 10°, a moisture content of 25°, being required for best results in the subsequent bulking and fermentation process (RK 8-9, 23-24, 26). As each priming reaches the appropriate stage, it must immediately be packed in baxes and taken from the farms to the bulking plant for further processing.

. The bulking process, although in one continuation of the preliminary earing which begins in the barn, is a much more complex process requiring extensive and expensive industrial equipment and much more carefully controlledconditions. (RK 22-27). In the bulking plant, the tobacco is immediately placed in piles known as "bulks" condisting of and requiring from 3,500 to 4,500 pounds of tobacco; any lesser amount will not retain and generate sufficient heat for the sweating and fermentation process. During this operation the temperature within the bulks is closely watched each day, and at regular intervals of from six to eight days the bulk is turned or shaken out, that is, the tobacco on the outside is placed on the inside and that on the top is placed on the bottom until the tobacco is in a condition in which it may be worked. this point, the tobacco is then separated, graded, kased (sprayed with water), and again placed

of the bulk continues until such time as the tobacco is in condition to be baled (RB 42, 56).

Expert evid ace in the record of the King Edward case reveals that the bulking process involves considerably more than simply drying out or removing moisture from the tobacco. The process is described as a "fermentation" or "aging" process which is "largely a process of slow combustion. (RK 24-25), involving carefully controlled regulation of heat, temperature and humidity conditions to insure "development of the desired odor and aroma and elimination of the rawness or harshness and in part the bitter. taste which characterize all, freshly cured leaf. * * * It is quite important, therefore, that the fermentation be properly controlled * (RK 22-23). In order to maintain proper temperature distribution throughout the bulking process, it is necessary that the bulk be "torn down and rebuilt" and the contents "redistributed" several times, and additional water added. "After each rebuilding of the bulk temperature rises more slowly and fails to attain the previous maximum unless additional water has been added." (RK 26). This bulk reconstruction process must be repeated usually from three to five times before the fermentation is completed (ibid.). Substantial dry matter, as well as moisture, is lost during the fermentation process, sometimes more dry matter than moisture (RK

2. This tebacco bulking process requires a large amount of valuable and expensive equipment, including a steam heated plant equipped with humidifying sprays, bulking platforms, kasing machinery and sprays, thermometers and thermometer tubes, buik-covers, bading boxes and presses, wax paper, bailing mats, packing, sorting and grading tables (RB 42, 56). These operations also require workers with special knowledge and experience in the processing of tobacco. Such a bulking, plant cannot be economically owned or operated by the ordinary small farmer growing less than 100 acres of this type tobacco a year (RB 35-36). Cultivation of less than 65. acres, per year, moreover, will not yield an adequate bulk of each priming for the processing operations (RB 36). Of the approximately 300. farmers growing Type 62 tobacco, 80 percent grow less than 25 acres per year and the majority grow from 115 to 10 acres per year (RB 30-146). There are only 11 bulking plant operators engaged in processing Type 62 tobacco and two. of these are not growers, at all (RK 56, 84A).

Only five, or 1.6 percent, of the 300 growers, maintain bulking plants processing only tobacco grown by the processor (*ibid.*). Thus, the overwhelming majority of farmers have their tobacco processed by others.

bacco itself and confines its operations to processing the obacco grown by 52 (the number for 1950) small farmers (on a total of 263 acres). During 1950, all of the 333,889 pounds of tobacco grown by these 52 farmers which was processed by Budd was also purchased by Budd which sold 231,209 pounds to the Budd Cigar Company; the remainder of the tobacco was sold in interstate commerce to various other persons or companies (ibid.). Respondent Joseph T. Budd, Jr., is president of the Budd Cigar Company and as such is active in the management of that corporation (RB.141, 142).

4. The other two plants involved in this litigation (those of respondents King Edward and

May) process only tobacco produced on farms operated by the processor. In addition to the plant involved in this litigation, respondent King Edward also operates two other bulking plants at which it processes substantial amounts of tobacco grown by others (RK 13). For 1951, King Edward bulked at its three plants approximately 595,901 pounds of tobacco, of which 354,967 was not grown on its farms but was purchased from other growers (RK 13).

Each farm and each bulking plant operated by King Edward is under the direct supervision of a superintendent who hires, fires, controls, and pays the employees (RK 14). Each bulking plant has its own separate payroll and production records which are maintained by King Edward's main office employees from records forwarded by the various superintendents (RK 14). Different wage scales are maintained as between farm employees and plant employees (ibid.). The cost to King Edward, in 1950, for tobacco purchased from others was \$744,262.39, whereas the farm cost for growing tobacco on its rented farms amounted to only \$482,709.80 (RK 14). The bulking plant cost for the 1950 crop was \$215,463.47, plus an "administrative cost" of

^{*}King Edward, however, owns none of the farm lands, tenant houses, warehouses or land beneath the warehouse, all of which is owned by Jno. Swisher & Son, Inc., of which King Edward is an affiliate (RK 13); such lands and building are leased to King Edward on an annual rental basis of approximately \$100,000 (RK 13).

\$62,643.06 (*ibid.*); the farm cost of \$482,709.80 represented approximately 32 percent of the total cost of \$1,505,078.72 to King Edward for its operations on the 1950 crop (*ibid.*).

5. The Budd plant employs approximately 108 employees in bulking, sorting, grading and baling tobacco (RB 47, 51-52, 141, 142); while King Edward employs approximately 120 employees and May approximately 70 employees in the same operations (RK 1, 4, 35, 40). The parties agree that none of the employees engaged in such operations were paid the minimum wage required by the Act (RB 141, 142; RK 46, 64); nor have the respondents maintained the records of wages, hours and other conditions of employment required by the Act (RB 156; RK 46, 64-65).

On cross-motions for summary judgment filed by the respective parties, the District Court entered decrees (RB 155-156; RK 77-78) enjoining respondents from violating the minimum wage and record keeping provisions of the Act. The District Court held that the Act's agriculture exemption (Sep. App., pp. 1, 2-3) ends when the tobacco reaches the receiving platform of the bulking plant, and rejected respondents' claims that their bulking plant employees are exempt from the Act under Sections 13 (a) (6) and 13 (a) (10) (Sep. App., pp. 2-3) (114 F. Supp. 865).

The Court of Appeals reversed, holding that the agriculture exemption applies to employees in

the King Edward and May plants which process only tobacco grown by the processor, and that this Section 13 (a) (10) exemption (Sep. App., p. 3) applies to the processing plants of all three of the respondents when the operations are performed within the "area of production." The court recognized that one of the conditions of the Administrator's definition of "area of production" was not met by any of the processing plants, but it held that the definition was invalid insofar as it limits the area of production to "the open country or in a rural community." and excludes "any city, town or urban place of 2,500 or greeter population." The court ruled that the Secretary of Labor was in no position to seek the remedy of injunction until a valid definition is made, since respondents "might likely fall with[in] a valid definition."

SUMMARY OF ARGUMENT

I

A. The Wage and Hour Administrator's definition of "area of production," pursuant to Section 13 (a) (10) of the Fair Labor Standards Act, is valid. That definition has now been in effect for 9 years, and indeed is, in essence, the same as an alternative definition issued over 16 years ago which contained virtually the same "rural area" or "population" criterion, and was left untouched by this Court's decision in Addison v. Holly Hill Co., 322 U. S. 607. As incorporated in the redefinition begg in issue, it was affirmatively upheld three years ago by the Tenth Circuit in the *Traders Compress* case (199 F. 2d 8) and a petition for certiorari was denied (344 U. S. 909).

The redefinition represents a most careful and deliberate effort by the Administrator to apply the guides enunciated in this Court's Holly Hills opinion. It was issued in December 1946, after extensive investigations and public hearings, including a special study of the tobacco industry, and was again thoroughly re-examined in 1951, after it had been in operation for more than four venrs. The objective of the redefinition was to meet the requirement of Holly Hill that the delinition be in terms of "area" or "geographic . bounds," taking into account this Court's explicit recognition that the Administrator's task was not a simple map-making one, but involved "complicated economic factors" which "the Administrator may properly weigh and synthesize" in delimiting the bounds of the areas, 322 U.S. at 613-616. The objectionable limitation of the previous definition, restricting the number of employees that might be employed in an exempt plant, was omitted, and the redefinition prescribed only that the place of employment be located in a rural area—outside a town of more than 2,500 population-and within a specified

mileage distance from the source of most of its commodities.

The "rural area" or "population" criterion, which is the sole condition here in issue, rested upon the plain Congressional intent to distinguish "between rural communities and the urban centers." The line drawn on the basis of the size of the town represents an effort to exclude from the area of production, insofar as feasible in a definition of general application, the urban industrial centers without excluding the areas of agricultural production. In choosing the 2,500 population figure, the Administrator relied heavily on the results reached by other Government agencies having long experience in distinguishing between areal and urban areas.

Respondents themselves do not appear to question the size of the town as a proper standard. Their quarrel is not with the standard itself but with the administrative judgment in drawing the line at the 2,500 figure. But this is precisely the cask which the Court has recognized was left by Congress to the "experienced and informed judgment" of the Administrator rather than to "the contingencies and inevitable diversities of litigation" (Holly Hill decision, 322 U. S. at 614). As the Court stated in upholding a comparable line prescribed by the Administrator for the mileage standard: "It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must

be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark.

Id. at 611. That cannot be said here.

B. Any doubt or the validety of the redefinition has been eliminated by Congressional approval subsequent to its issuance. Although repeatedly advised of the definition and of the criticisms made of it asard despite specific proposals to change it. Congress has declined to modify the definition or revise the statutery language. Of particular significance-in view of the respondents' reliance on the Secretary of Agriculture's definition of "production area; -is-the Congres-. sional rejection of a proposal to transfer authority to define "area of production" from the Administrator to the Secretary of Agriculture. Congress has not only declined proposed revisions. but has affirmatively approved existing administrative regulations in Section 16 (c) of the Fair Labor Standards Amendments of 1949. See Alstate Construction Co. v. Durkin, 345 U. S. 13, 16-17; Maneja v. Waialua Agricultural, Co., 349 U. S. 254, 270.

Π

Trrespective of the validity of the definition of "area of production," respondents bulking plant employees do not meet the other requirements for exemption under Section 13 (a) (10) because the processing operation in which they are engaged is not one of those specified in that section nor is it limited to "agricultural or horiscultural commodities." The specificity of Section 13 (a) (10) precludes the exemption's applying to processing operations not expressly mentioned. Powell v. United States Carridge Co., 339 U.S. 497; Holly Hill decision, 322 U.S. at 617; Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755.

(1) The tabacco bulking process is not specifically enumerated in Section 13 (a) (10), as are "ginning," "pasteurizing," "compressing" and "canning," which are forms of industrial or quasi-industrial processing that may change the natural state of commodities in a way possible analogous to tobacco bulking. Nor is tobacco bulking "drying," which, by any recognized definition, is limited to simple dehydration or removal of moisture. Most of the moisture has been removed from the tobacco in the preliminary barn curing process on the farm before the tobacco reaches the bulking plant. . The bulking process, on the other hand, is a complex; carefully conditioned and prolonged process requiring extensive and tremendously expensive industrial equipment and special skills, and involves more addition than it does removal of moisture. Equally inapplicable to tobacco bulking are the general terms "handling," "packing," or "storing." which plainly refer to simple non-processing

operations which do not substantially charge the raw or natural state of commodities.

Like the sagar milling in Maneja v. Waialua Agricultural Co., 349 U. S. 254, 268, the tobacco bulking process is more an "industrial" or "manufacturing operation" in the courses of which the tobacco is very substantially changed from its "raw or natural state." The confext of the phrase "agricultural or horticultural commodities" in Section 13 (3) (10), as well as the relationship of this exemption to other exemptions for processing of such commodities (notably Section 7 (c)), demonstrate that the general terms in Section 13 (a) (10) all relate to operations on the natural commodity prior to its industrial processing.

(2) Moreover, tobacco processing was specifically and deliberately omitted from both this exemption and the general agriculture exemption (Section 13 (a) (b)). Specific proposals to include tobacco warehouse employees within these exemptions were repeatedly rejected both in the House and in the Senate, and even these proposals did not go so far as to propose exemption for tobacco processing operations. The debates on the proposals plainly indicate that they were rejected because their reffect might have been to exempt processing operations. The legislative history also shows that the term "processing" and processing operations generally, except for those specifically enumerated (i. e. "ginning,"

"pasteurizing," "compressing," and "canning"), were deliberately omitted from this exemption by its sponsors in both the House and the Senate.

(3) Further confirmation of the intent to exclude processing operations, except for those specifically enumerated, may be found in the Section 7 (c) exemption, from the overtime requirements only, of "first processing" of agricultural commodities, which must be read in pari materia with the other exemptions relating .to agricultural operations. If Section 13 (a) (10), which grants a complete wage, and hour exemption, is construed to include operations which properly may be classified as "first processing," the limited exemption in Section 7 (e) becomes meaningless. The tobacco bulking process here constitutes "first processing" under Section 7 (c) rather than any of the operations listed in Section 13 (a) (10), and Section 7 (c) "marks the outer limit of congressional concession to this type of processing." See Waialua, 349 U.S. at 269.

(4) The Administrator's interpretation that the tobacco bulking process is not included in Section 13 (a) (10), like the Administrator's regulation defining "area of production" (see supra, p. 14), has been ratified by subsequent legislative developments. The interpretation was repeatedly stated and published long before the 1949 Amendments to the Act and was outstanding at the time of the enactment of the Fair

Labor Standards Amendments of 1949. It is, therefore, within the scope of Section 16 (c) of that Act which explicitly kept "in effect" outstanding interpretations of the Administrator or the Secretary, not inconsistent with those amendments.

· III

The general agricultural exception in Section 13 (a) (6), admittedly inapplicable to respondent Budd's plant (which processes tobacco grown by numerous small farmers), is also inapplicable to the off-the-farm bulking plant operations of respondents King Edward and May (which process only their own tobacco), because the bulking process is not "agriculture" as defined in Section 3 (f).

(1) As this Court recognized in its Waidua decision, the Congressional scheme in Sections 13 (a) (6) and 13 (a) (10) was to equalize the status of large and small farmers, both provisions being equally concerned with "marking the dividing line between processing as an agricultural function and processing as a manufacturing function" (349 U. S. at 268). The omission of a processing operation from Section 13 (a) (10) is most significant evidence that Congress "concluded that it also fell outside the agriculture exemption" (Ibid.). Conclusive evidence that Congress deemed tobacco processing to be outside the scope of the "agriculture" exemption

is the fact, mentioned above, that the specific proposals to exempt tobacco warehouses, which were repeatedly rejected, were offered as amendments both to the definition of agriculture and to the provision which subsequently became Section 13 (a)(10).

(2) The Fifth Circuit's opinion, which was rendered prior to this Court's decision in Waialua, relies solely on two factors which, under the latter decision, plainly do not determine the applicability of the agriculture exemption. That exemption was held inapplicable to Waialua's sugar processing plant (1) despite the fact that Waialua, like the plants of King Edward and May, processed only its own grown agricultural commodity, and also (2) despite the fact that the commodity, "unmilled sugar cane", is "unmarketable as such" and "must be processed within a few days of harvesting or serious spoilage will result" (349 U. S. at 257, 265). Indeed, the sugar milling in Waialua was much more essential for marketing the crop, and much closer in both time and sequence to the actual farming, than is the tobacco marketing process.

On the other hand, the factors—ignored by the court below—which this Court held in Waialua to be most pertinent and significant are equally, if not more, determinative in the instant case. Thus, the undisputed evidence shows that the tobacco

bulking operation is not "ordinarily done by farmers," and the operation "is certainly an industrial venture." which "transforms" the tobacco "from its raw and natural state" resulting in a change "more akin to manufacturing than to. agriculture" (349; U. S. at. 265). The final significant factor which establishes the parallel between this case and the Waialua sugar mill is the "omission * * * from the exemption provided by Section 13 (a) (10) for various processing operations performed within the area of production" (349 U. S. at 267). While the court below erroneously assumed that the tobacco bulking operation is included in the Section 13 (a) (10) exemption, it is clear, on the contrary, that it was deliberately excluded. Supra, pp. 14-19.

ARGUMENT

All three respondents claim the benefit of the full exemption accorded to certain agricultural operations by Section 13 (a) (10) of the Fair Labor Standards Act (Sep. App., p. 3) on the ground that the Administrator's definition of "area of production"—as used in that Section—is invalid. In Point I, infra, we show that this contention has no merit, and that the definition which excludes respondent's operations from the exemption is fully valid. In Point II, infra, we urge, alternatively, that, irrespective of the validity of the Administrator's definition of "area of production", respondents are not entitled to

the Section 13 (a) (10) exemption because they do not fall within the other requirements of that provision. If we are correct in either of these arguments, the judgment below must be reversed as to respondent Budd which relies, in this Court, solely on Section 13 (a) \$\pi(10)\$. The other two respondents, King Edward and May, also rely on the general agricultural exemption in Section 13 (a) (6) (Sep. App., pp. 2-3), but we show in Point III, infra; that, a fortiori, that exemption is likewise inapplicable to the tobacco bulking operations involved here.

I. THE WAGE AND HOUR ADMINISTRATOR'S REDEFINI-TION OF "AREA OF PRODUCTION" PURSUANT TO SECTION 1 TO A THE FAIR LABOR STAND, ARDS ACT IS VALID.

Section 13 (a) (10) of the Fair Labor Standards and ever (quoted ins full. Sep. App., p. 3) exempts from both the minimum wage and overtime requirements of the Act any individual employed within the area of production (as defined by the Administrator), engaged in specified activities on agricultural or borticultural commodities. The Administrator's definition

^{*}Section 7 (c) (Sep. App. pp. 1-2) who provides that in the case of an employer coraged "in the first processing, within the area of production (as defined by the Administrator), of any agricultural or hotteraliural commodity during seasonal operations" the overtime provisions shall not apply "during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year."

provides that a plant is within the "area of production" if it is located (1) "in the open country or in a rural community" (which for "purposes of this section" "shall not include any city, town or urban place of 2,500 or greater population") and (2) within a specified mileage distance from the source of 95% of its commodities. (Sep. App., pp. 4-6):

This administrative definition has now been in effect for nine years, and indeed is basically the same as one of the alternative definitions of area of production" (the general vicinity plus rural community alternative) issued shortly after the enactment of the Act over 16 years ago. See Addison v. Holly Hill Co., 322 U. S. 607 at 609-611. While this Court, in the Holly Hill case, held invalid the other alternative definition of the Administrator's earlier regulation, invalidity was predicated solely upon the non-geographic criterion of that alternative which placed a limitation on the number of employees that might be employed in an exempt establishment. The mileage plus rural area alternative, which in basic

⁵ With respect to operations on tobacco the distance prescribed is 50 airline miles. Respondents bulking plants concededly meet the mileage test but do not meet the "rural area" test inasmuch as they are located in a town with a population greater than 2,500. Quincy, Fla., has a population, according to the 1950 census, of 6,586 (RB 49).

The Court voided the part of the original regulation which provided that, to be exempt, the establishment could not employ more than seven employees. 322 U.S. at 611, 618-619.

was not invalidated by this Court. On the contrary, the mileage aspect was specifically recognized as valid (322 U. S. at 610/611), and the Court found it unnecessary to pass on the rural area (sometimes called "population") criterion because that condition was concededly met. 322 U. S. at 610. The comparable redefinition here in issue was held valid in both aspects by the Tenth Circuit three years ago in Tobia v. Traders Compress Co., 199 F. 2d S, which approved both the rural area and the mileage criteria, and this Court denied a petition for certiorari. 344 U. S. 909.

The redefinition, adopted after extensive consideration and full hearings, conforms to this Court's ruling in Holly Hill and employs only geographic criteria which take into account, insofar as consistent with the drawing of geographic lines, the relevant economic factors. Moreover, during the intervening nine years since the issuance of the redefinition Congress has repeatedly been advised of the redefinition and of the criticisms of it, and has declined to enact specific proposals to revise either the regulation or the statu-

The only two Courts of Appeals which have since ruled on the question, the Fifth and Tenth, have both recognized the validity of the mileage test. In addition to the Tradicis Compress decision cited in the text, and Jenkins v. Durkin. 208 F. 2d 941 (C. A. 5), a similar test was held valid by the Fifth Circuit prior to the Holly Hill decision, in Fleming v. Farmers Peanut Co., 128 F. 2d 404.

tory provision under which it was issued. Indeed, Congress has refused to make any change despite repeated recommendations by the Administrator and the Secretary of Labor who have pointed out certain unavoidable inequities inherent in the solely geographic criteria adopted in the redefinition to accord with the statutory terms as construed in the Holly Hill decision. In view of these considerations, which are developed more fully below, we submit that the validity of the redefinition is not open to question.

A. THE DEFINITION ACCORDS WITH THE STATUTORY TERMS AND THIS COURT'S DECISION IN ADDISON E. HOLLY HILL, AND IS RESTRICTED TO GEOGRAPHIC CRETERIA WHICH TAKE INTO ACCOUNT, INSOFAR AS CONSISTENT WITH THE DRAWING OF GEOGRAPHIC LINES, THE RELEVANT ECONOMIC FACTORS

(1) The redefinition represents a most careful and deliberate effort by the Administrator to apply the guides enunciated in this Court's Holty Hill opinion. It was issued only after extensive investigation and conferences with various interested parties, and after public hearings conducted on behalf of the Administrator, at which testimony, recommendations, and representations were adduced by industry and employee representatives. In addition to the six formal hearings, numerous informal conferences were held throughout the country with representatives of labor and of the industries involved. Substantial economic data, including economic reports treat-

definition, specifically covering the tobacco industry, were assembled by the Department of Labor. After all these studies were completed, the Administrator published detailed findings indicating the major considerations entering into the promulgation of the redefinition and explaining the manner in which he sought to apply the principles enunciated in Holly Hill. 3 CCH Labor Law Reporter, par. 23,282 (Sep. App., pp. 6-40).

The redefinition was thoroughly re-examined in extensive administrative hearings held in 1951, after it had been in operation for more than four years. At that time the complete records of the original hearings held in 1938-1940, as well as the records in the hearings held in 1944-1945 preceding the issuance of the redefinition, were reconsidered, in addition to some 800 pages of new evidence, 73 statements in lieu of personal appearance, 45 exhibits, and approximately 150 responses to the Administrator's request for proposed amendments to the definition. (See Report and Recommendations of the Presiding Officer, unpublished but available in the records of the . Department of Labor). At this later hearing, six members of the cigar tobacco industry testified or submitted statements, including specifically representatives of the Budd and King Edward companies, respondents in the instant case. After full consideration of all of this evidence, the .
Administrator concluded:

The present definition accomplishes the statutory purpose more effectively than any definition proposed at the hearing. Changes in the present definition within the limitations imposed by the decision of the U. S. Supreme Court in the Hally Hill case would at best be only palliative in their effect. At worst, they would widen the existing areas of confusion and uncertainty and shift and intensify the inequitable effects. The only real and lasting solution to the problem is a legislative one. [19 F. R. 4482.]

(2) The objective of the redefinition, as stated by the Administrator in his findings (3 CCH Labor Law Reporter, par. 23,282; Sep. App., pp. 7 ff), was to meet the requirement of Holly itill that the definition be in terms of "area" or "geographic bounds," taking into account the Court's explicit recognition that the Administrator's task was not a simple map-making task, but involved "complicated economic factors" which "the Administrator may properly weigh and syn-

A significant fact developed by this latest hearing was the apparent general acceptance of the redefinition by the major industry groups affected. "Considerably less interest was evidenced in this hearing than in the previous hearings. Large segments of the major industry groups which employ approximately three quarters of the employees who are affected by the definition" did not even appear at the hearing. See Findings of the Administrator, 19 F. R. 4482.

thesize" in delimiting the bounds of the areas. 322 U. S. at 613-616. Specifically, the Administrator is to designate "a zone within which economic influences may be deemed to operate and outside of which they lose their force" (id: at 614). The decision expressly recognized that there is a "choice of areas open to the Administraior!" depending upon consideration of the pertinent economic factors (id. at 619); "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter. (id. at 614). As stated in the majority opinion in Trader's Compress, supra, "from the Addison [Holly Hill] case, we are clear that 'area of production' cannot be measured or delineated by the mere fact of production alone. If the task had been deemed that simple, Congress could have easily provided its own definition without resort to administrative implementation". (199 F, 2d at 10).

On the basis of his careful and exhaustive survey, the Administrator adopted two basic criteria, both formulated in terms of geographic area but also taking into account the complicated economic factors. The redefinition omitted the number of employees limitation which this Court found objectionable in *Holly Hill*, supra. p. 22, and prescribed only that the place of employment be located within a rural area (supra. p. 22) and within a specified mileage distance from the strain-56—3

source of at least 95% of its commodities (supra, p. 22).

The requirement that the employment be within a rural area, which is the sole condition here in issue, was based upon the plani Congressional intent to distinguish "between rural communities and the urban centers," (Sep. App., p. 8; see 322 U. S. at 615). This problem was approached directly by drawing the bounds of the area of production so as to exclude, insofar as was feasible in a definition of general application, the urban industrial centers without excluding the area of agricultural production. The Administrator's findings state: "An analysis of all the available data indicated * * * that while the size of a town is not a perfect criterion of its urban or industrial character, it is nevertheless, the best available test, and leads to results which in general are accurate enough to warrant its adoption" (Sep. App., p. 20). The results reached by other Government agencies having long experience in distinguishing between rural and urban areas were heavily relied upon in choosing the 2,500 figure (Sep. App., pp. 21-23). As the industrial areas of gities were found generally extend at least short distances beyond their politieal boundaries, a miléage tolerance for this test was found necessary to avoid discrimination not based on substantial economic differences (Sep. App., pp. 23 ff).

It is an indisputable fact that agricultural production of any significance is usually carried on in rural areas and not in urban centers. This is one of the "economic factors" which the Administrator could searcely ignore, and which this Court directed him to consider. Even under the view of the court below, that the Administrator is restricted to defining the geographic bounds of the land area within which the particular conmodity is actually produced, it would be difficult to find fault with that part of the definition which merely excludes the centers of urban life. This aspect of the definition accords with the legislative history, which, as this Court noted in Holly Hill, shows that Congressman Biermann, who sponsored the statutory provision in question, indicated "plainly enough" that he had in mind, differences between establishments in "rural communities and urban centers." 322 U.S. at 615. Certainly, the "rural area" test cannot be regarded as arbitrary or unrelated to the factors the Administrator was directed to consider or the ends he was to attain. This element was squarely within the realm in which "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter." in the exercise of his "experienced and informed judement" (322 U.S. at 614).

Respondents are frank to admit that "The House debates evidence some concern that plants located in large cities and in industrial and urban centers should not enjoy the exemption, and there should be a labor differential between the large city and the little town" (Br. in Opp., p. 30). And they observe that a definition which excludes establishments located in a "city of over 30,000" "would appear reasonable" (ibid., p. 27). Thus, respondents do not seem to question that the size of a town is a proper consideration to be applied in drafting a definition of "area of production." They are complaining only that the line was drawn too rigidly by the Administrator because it did not exempt the city in which their plants are located. Their quarrel, then, is not with the general standard employed by the Administrator but with his judgment in applying that standard.

But the Holly Hill decision clearly recognizes that this is the very task left by Congress to the "experienced and informed judgment" of the Administrator, rather than "to the contingencies and inevitable diversities of litigation." In upaholding the Administrator's comparable line prescribed for the mileage standard. this Court quoted Mr. Justice Holmes, as follows (322 J. S. 607, 611):

Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it pre-

eisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark.

As the Administrator's findings point out (Sep. App., app. 22-23), the choice of the 2,500 town as the dividing line between "rural" and "urban" is supported by the long-standing usage of the Bureau of the Census and other Government agencies, by private studies comparing facets of rural and urban life, by certain Congressional enactments, and by national statistics as to the handling and processing of agricultural and horticultural commodities. Against this background, the Administrator's choice of 2,500, rather than some higher figure as respondents would desire, cannot be said to be "very wide of any reasonable mark" (supra).

The only other Court of Appeals to have considered the precent regulation, the Tenth Circuit in the Traders Compress decision, supra, sustained it as one which is "based upon relevant economic factors" and which "does bear a reasonable relationship to the purposes of the exemption, and is therefore not arbitrary and capricious." Specifically on the "rural area" test, the court stated: "From an analysis of available data.

² Cf. Securities, and Exchange Commission v. Chency Corp., 332 U. S. 194, 209; Securities and Exchange Commission v. Central-Himais Securities Corp., 338 U. S. 96, 127; Unemployment Compensation Commission v. Avagor, 329 U.S. 143.

the Administrator recognized that the size of a town is not a perfect criterion of its urban or industrial character, but it was adopted as the best available test, and leads to results generally accurate" (499 F. 2d at 11). "Having in mind that the primary object of the definition is to attempt to arrive at an economic balance between giral and industrial labor conditions * * * we cannot say that populations of cities and towns is not a relevant economic factor in determining whether labor conditions are predominantly rural or industrial" (ibid.).

B. CONGRESS HAS, TN EFFECT, APPROVED THE ADMINISTRATOR'S DEFINITION

Administrator's redefinition, it has been eliminated, we submit, by Congressional approval subsequent to its issuance. Congress has repeatedly been advised of the redefinition and of the criticisms of it, and has an several occasions declined to enact specific proposals to revise the regulation and the statutory provision under which it was issued. Not only have interested employers criticized the definition and proposed spagific amendments to Congressional compattees, but also the

The attorney who represented the Traders Compress Company appeared before both the Senate and House Committees and made the same arguments against the Administrator's definition, including a direct attack upon the "rural area" test, that he later advanced before the Tenth Circuit in Traders Compress. See Hearings before a Subcommittee of, the Committee on Labor and Public Welfare on S. 58, S. 67,

Administrator and the Secretary of Labor on numerous occasions have recommended revision of Section 13 (a) (10) in order to alleviate certain recognized competitive inequities and administrative difficulties inherent in any purely geographic definition of area of production. This recommendation has been frequently repeated by the Administrator and the Secretary of Labor, both through annual reports to Congressional committees considering the subject.

The aftermath of the testimony and proposals before the Congressional committees considering the 1949 amendments to the Act was a recommendation by the Senate Committee for repeal of the minimum wage exemption altogether (Senate Report No. 640, 81st Cong., 1st sess., July 8, 1949, p. 2, Sep. App., pp. 133, 134). The bill was passed

S. 92, S. 105, S. 190, S. 248, and S. 653, 81st Cong., 1st Sess. (1949), pp. 658-765; and Hearings before the Committee on Education and Labor on H. R. 2033, 81st Cong., 1st Sess. (1949), Vol. 1, pp. 872–887, 912–945.

¹¹ Illustrative are the 1948 Annual Report of the Wage and Hour and Public Contracts Divisions, pp. 123-134, and the 1950 Annual Report of the Secretary of Labor, pp. 281-285.

For example, see the testimony of the Administrator before the Senate and House Committees considering the 1949. Amendments of the Act, Hearings before the Committee on Education and Labor in H. R. 2033, 81st Cong., 1st Sess. (1949), p. 56; Hearings before a Subcommittee of the Committee on Labor and Public Welfare on S. 49, S. 151, S. 160, S. 161, S. 557, S. 731, S. 1048, S. 1076, S. 1288, S. 1400, S. 1404, S. 1509, S. 2062, and S. 2386, 80th Cong., 2nd Sess. (1948), pp. 40 42, 82–83, 165.

by the Senate, however, retained the exemption in its original form (95 Cong. Rec. 12435-12436, 12583). See Sep. App., pp. 133-153. Although the House bill would have amended the exemption to transfer authority to define "area of production" from the Administrator to the Secretary of Agriculture, this was abandoned in conference and the bill, as enacted, left the "area of production" provision unchanged (95 Cong. Rec. 14933, Sep. App., pp. 133, 147). The rejection of this proposal is particularly significant here in view of the respondents' reliance upon the definition of "production area" by the Secretary of Agriculture (see-Br. in Opp., pp. 27-28). Obviously, if Congress had intended that the Administrator adopt the definition of the Secretary of Agriculture, it would have been a simple matter to have stated so expressly or to have adopted the House amendment.

Furthermore, Congress has had actual knowledge of the redefinition practically since it was issued. In February 1947, the redefinition and the Administrator's findings were both called to the attention of a House subcommittee considering the Portal-to-Portal Act of 1947. A number of witnesses appearing before this subcommittee testified that the "rural area" test of the redefinition would remove from the "area of production" many employers who would be within it under the definition invalidated in Holly Hill. Un-

¹⁸ See Hearings Before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 80th Cong., 1st Sess., on H. R. 584 and H. J. Res. 91, pp. 210-221.

doubtedly, it was this testimony that led to the enactment of Section 12 of the Portal-to-Portal Act of 1947, 29 U.S. C. 251, 261, Sep. App., pp. 3-4, which specifically referred to the redefinition in providing exemption from liability that might have been incurred through its retroactive operation.

Not only did Congress thus decline to modify · the Administrator's regulation or revise the statutory language, but it affirmatively approved existing administrative regulations by providing in · Section 16 (c) of the Fair Labor Standards Amendments of 1949, 63/Stat. at 920, that "any order, regulation, or interpretation of the Administrator of the Wage and Hour Division * * * in effect under the provisions of the Fair-Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect * * * except to the extent that any such order, regulation [etc.] * may be inconsistent with the provisions of this Act * * *." This legislative action was taken, as we have indicated, in the face of repeated petitions for revision of the "area of production" requirements by both interested employers and the officials charged with enforcement of the Act. It would seem to follow, a fortiori from this Court's decisions, that Congress has confirmed and ratified the Administrator's regulation redefining "area of production:" See Alstate Construction Co. v. Durkin, 345 U. S. 13, 16-17; Maneja v. Waielua Agricultural Co., 349 V. S. 254, 270.

II. PRESPECTIVE OF THE VALIDITY OF THE DEFINITION OF "AREA OF PRODUCYION," RESPONDENTS BULKING PLANT EMPLOYEES DO NOT MEET THE OTHER REQUIREMENTS FOR EXEMPTION UNDER SECTION 12 (A) (10) BUCAUSE THE PROCESSING OPERATION IN WHICH THEY ARE ENGAGED IS NOT ONE OF THOSE SPECIFIED IN THAT SECTION AND IS NOT LIMITED TO "AGRICULTURAL OR HORTICULTURAL COMMODITIES"

The operations enumerated in Section 13 (a) (10) are:

* * * handling packing storing ginning compressing pasteurizing drying preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market * * *

The section thus does not exempt every operation which in a broad sense may be necessary for marketing agricultural products, as the court below erroneously assumed. On the contrary, the exemption is limited to individuals engaged only in the specifically enumerated operations on "agricultural or horticultural commodities." Such specificity precludes any implication that the exemption applies to processing operations not expressly mentioned. Addison v. Holly Hill, 322 U. S. at .617; Powell v. United States Cartridge Co., 339 U. S. 497, 517; Farmers Reservoir Le Irrigation Co. v. McComb, 337 U. S. 755, 759-760, 764-766; Phillips Co. v. Walling, 324 U. S. 490, 493. Tobacco bulking is not only not one of the specifically enumerated operations, but bulked tobacro is not an "agricultural or horticulm Section 13 (a) (10). The legislative history furnishes conclusive evidence that tobacco processing was deliberately comitted from this exemption—an Ginission which this Court has recognized as most significant in determining the application of the "agriculture" exemption provided by Section 13 (a) (6), as well as of Section 13 (a) (10). See Mancjay, Waialna Agricultural Co., 349 U.S. 254, 267-268. The decision below heiding that the bulking of tobacco is within the scope of the exemption is incorrect, therefore, irrespective of the validity of the definition of "area, of production."

(1) The tobacco bulking process is not specifically enumerated in Section 13 (a) (40), as are "ginning," "pasteurizing," "compressing" and "canning" which are forms of industrial or quasi-industrial processing that may change the natural state of the commodity in a way possible analogous to tobacco bulking. "Drying is also specifically enumerated, but that term, by any recognized definitions is limited to simple deshydration or removal of moisture.

In sharp contrast, the bulking process is described by experts as a "very careful and precise" operation which is "largely a process of slow combustion" involving carefully controlled regulation of heat and limitedity (RK 24-25). Contrary to the contention made by respondents below, bulking is not a simple dehydration opera-

Indeed, it involves more addition than it does removal of moisture. Most of the moisture has been removed in the preliminary drying process in the barns on the farm before the tobacco reaches the bulking plant (RK 23-24, 30; RB 148). See Statement, supra, pp. 4-5. The drying operation which takes place in the barns reduces the content from between 80 and 85 percent to between 25 and 10 percent, which is about the same moisture content of the tobacco. when the bulking process is completed (ibid.), Thus, while the operation in the barns is essentially a drying operation, the bulking process requires much more carefully conditioned and prolonged treatment with the use of the extensive industrial equipment (see Statement, supra, pp; 5-8). It is a processing more comparable. to the "redrying" process applied generally to non-cigar types of tobacco." This "redrying" process, usually performed on non-cigar type tobacco, like the bulking process on cigar tobacco, is the first processing of the tobacco after it leaves the farm.15 The inapplicability of the Section. 13 (a) (10) exemption to such "redrying" plants has long been accepted by the industry.

Yearbook of Agriculture, 1954, United States Department of Agriculture, pp. 440-442; United States Department of Agriculture Circulator No. 249, American Tobacco Types, Uses, and Markets (1942), pp. 61, 69-70, 81-86.
12 Ibid.

The most comprehensive term enumerated in the section is "preparing" and it is expressly limited to "preparing in their raw and natural state." From the legislative history it is clear that this term contemplates only such simple operations as washing the raw commodity, not "processing" the commodity into an industrial product. See the colloquy among Senators Barkley, Schwellenbach, and Black, 81 Cong. Rec. 7877-7878, Sep. App., pp. 53-65.

It seems equally apparent that the other general terms, "handling," "packing" or "storing." also refer to simple non-processing operations, such as loading and unloading commodities or weighing or moving them from one place to another, placing them in containers or in storage rooms, and preparing activities which do not substantially change the raw or natural state of the commodities. Certainly, these terms do not include the operations here involved which require · 'ta tremendously large amount of valuable and expensive equipment" and "above all, the ability and knowledge of the handling gained only through experience" (RB 42); and which result in "a decided c' . rease in amino nitrogen and an increase in ammonia," "substantial losses" of citric and malic acids, a modification of the "physical constants of the ethereal oils," a loss in nicotine content "commonly ranging from 15 to 25 percent or more of the total originally

present," a reduction of the starch or sugar content of the tobacco and a substantial loss in dry matter (RK 27-28). See, also, the Statement, supra, pp. 6-7.

Moreover, like the sugar milling in Muncja v. Waialua Agricultural Company, 349 U. S. 254, 268; this tobacco bulking process is more of an "industrial" or "manufacturing operation" in the course of which the tobacco is very substantially "changed from its 'raw or natural state" into an industrial product and is, therefore, no longer an "agricultural or horticultural" commodity within the meaning of Section 13 (a) (16). Whether or not the term "raw or natural state" grammatically modifies all of the preceding operations in Section 13 (a) (10), as the courts have held," the context in which the phrase "agricultural or horticultural commodities" is

See Pucita Rica Valueco Marketing Coop. Ass'n. v. Met amb. 181 F. 2d 697, 701 (C. A. 1); Whatt v. Halteille Attalia Mills, 106 F. Supp. 624, 631 (S. D. Cal.), reversed in part (on other grounds) and remanded for further findings. 12 W. H. Cases 635, decided August 31, 1955 (C. A. 2).

Earlier drafts of this exemption plainly indicate the intent to qualify all of these terms by the "raw or natural state" phrase. The Senate version of the bill which finally became the Act (S. 2475), passed on July 31, 1937 (81 Cong. Rec. 7957), included as Section 2 (a) (19) the provisions of the Schwellenbach amendment which added to the definition of agriculture the following:

[&]quot;The term 'person employed in agriculture' as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production

used, as well as the relationship of this exemption to other exemptions for processing of such commodities (notably Section 7 (c)) (see infra, pp. 46-48), demonstrate that the "handling," packing, "storing, and "preparing operations, referred to in Section 13 (a) (10), all relate to the natural commodity prior to its industrial processing.

engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state.

While this provision is clear enough upon its face. Senador Schwellenbach made it admistakably plain in Senage debate that he intended to restrict his proposed examption to operations upon fresh fruits or vegetables in their "raw or natural state" (81 Corg. Rec. 7876-7878, 7849, Sep. App., pp. 53-65). Also see 81 Cong. Rec. 7656-7658, 666, in which a similar amendment was debated along the same lines.

The House Committee on Labor approved and reported the bill with this provision intact (S. 2475), as reported to the House on August 6, 1927, in House report No. 1452, 75th Cong., 1st Sess.) and it was retained in the same form through many revisions of the bill. For examples, see Section 2 (a) (9) of House Connidential Committee Print of November 26, 1937, 75th Cong., 2nd Sess., Section 2 (a) (29) of House Confidential Committee Print of December 7, 1937; Section 2 (a) (20) of House Committee Print of December 14, 1937. Section 2 (a) (20) of the bill, recommitted to the House on December 17, 1937, changed the provisions only slightly to read as follows:

"The term 'person employed in agriculture' * * * shall include persons employed within the area of production engaged in preparing, packing or storing agricultural commodities in their raw or intural state * * * * *

The ambiguity caused by the location of the phrase "raw or natural state" in later drafts of this provision appears to have been an inadvertent result of amendments inserting other specified processes ("ginning." "compressing." pasteurizing," and "drying") in addition to the operations inclined in earlier drafts of the birl.

(2) That tobacco processing was, specifically and deliberately, omitted from both the Section 13 (a) (10) exemption and the general agricultural exemption (Sections 3 (f), 13 (a) (6)) is conclusively confirmed by the legislative history. Specific proposals to include tobacco warehouse employees within these exemptions were repeatedly rejected both in the House and in the Senate. Senator Reynolds of North Carolina proposed that the agriculture exemption be amended by adding the following: "The provisions of this act shall not apply to tobacco warehouses, their employers or employees," He stated that the reason for this proposal was that the North Carolina tobacco warehouses were purely seasonal, operating only for a period of 3 or 4 months a year. 81 Cong. Rec. 7878-7879 (Sep. App., pp. 101, 106). Senator Barkley objected to the proposal on the specific ground that many tobacco warehouses also engaged in processing, such as prizing, stripping and stemmings "during almost the whole year," and Senator Black objected on the ground that other provisions of the Act adequately took care of exemptions for seasonal activities. Ibid. 7879-7880 (Sep. App., . pp. 104-106, 109-110). The proposal was rejected. Ibid. 7887 (Sep. App. 119).

A somewhat similar proposal by Representatives Barden and Cooley of North Carolina, limited to "persons employed in connection with the

selling of tobacco in auction warehouses"; was likewise rejected. 82 Cong. Rec. 1783 (Sep. App., pp. 119-122). Representative Cooley then made a proposal for exemption of tobacco auction ware-·houses from the overtime provisions only, pointing out that "we were defeated when we attempted to exempt them from the wage provision." 82 Cong. Rec. 1804-1805 (Sep. App., pp. 122-124). This proposal, providing only an exemption from the overtime provisions of the Act, was agreed to. Id. 1806 (Sep. App., p. 124). A final attempt was subsequently made by Representative Cooley to secure the wage exemption for tobacco anction warehouses by an amendment to the section "employee employed in agriculture," which was the forerunner of Section 13 (a) (10) of the Act. This proposal was also rejected. \ 83 Cong. Rec. 7408-7410 (Sep. App., pp. 125-130). And even the proposal to exempt the tobacco auction houses only from the overtime provisions was finally rejected. Ibid. 7428-7429 (Sep. App., pp. 130-133).".

It is significant that even these defeated proposals did not go so far as to propose exemption for tobacco processing operations. On the contrary, Senator Reynolds expressly stated that it

¹⁷ The earlier amendment, which had previously been passed by the House (82 Cong. Rec. 1806), had been omitted by the Committee from the bill reported after recommitment (Sep. App., pp. 124-125)

is not my intent" to exempt the type of tobacco warehouse described by Senator Barkley in which processing operations were carried on "more or less year round," but "merely to exclude tobacco warehouses that are engaged in what may be called seasonal work, from 2 to 3 months in the year" when they simply received and immediately sold the tobacco brought in by the farmers. 81 Cong. Rec. 7879 (Sep. App., pp. 104, 106). And he readily accepted an amendment to his proposal which would limit it to "where the employment is seasonal in character." Itid, Similarly, the proposals in the House were limited to auction warehouses which Representatives Barden and Cooley emphasized engaged in "entirely seasonal" work which "only lasts 3 or 4 months, at the most, in the fall of the year," and involves simply labor employed to assist the farmers, "who come in at all hours of the night, and day, too, as far as that is concerned, to unload their tobacco cargoes." 82 Cong. Rec. 1783, 1895 (Sep. App., pp. 120-121, 123); 83 Công. Rec. 7428 (Sep. App., p. 131).

Further compelling evidence of the intent to exclude tobacco processing from the complete exemption for agricultural operations—embodied in Sections 13 (a) (b) and (13) (a) (10)—is apparent from the outcome of the proposals to exempt cotton ginning and compressing. These proposals were usually made concurrently with

the proposals to exempt tobacco warehouses. 81 Cong. Rec. 7879-7887 (Sep. App., pp. 106-108, 119); 82 Cong. Rec. 1785, 1806; 83 Cong. Rec. 7421. As finally macted, Section 13 (a) (10), the correlative of the general agriculture exemption in Section 13 (a) (b), expressly mentions "ginning and compressing," whereas neither Section 13 (a) (10) nor any other section of the Actospecifically refers to tobacco processing operations."

It is also clear that the minimum wage exemptions for agricultural activities were deliberately designed to exclude "processing" generally. Both Senator Schwellenbach and Representative Biermann, who spensored the exemptions which were later incorporated in Section 13 (a) (10), took pains to point out that their proposals did not include "processing." Senator Schwellenbach stated specifically, "I did not include "processing" * * * I have tried to limit the amendment to what I consider purely agricultural operations (81 Cong. Rec. 7876). When an operation "becomes processing," he explained, it would not

The seasonal exemption, which Senator Reynolds was sponsoring appears to have been taken care of by the mirst processing" exemption and by the exemption for industries found to be "of a seasonal nature," from the occrtime requirement only, in Sections 7 (c) and 7 (b) (3), respectively, which, we submit, "marks the outer limit of congressional concession, to this type of processing." See Main jack. Waialna Agricultural Co., 349 U.S. at 269.

qualify for exemption under this proposal, because "there is no inclusion of processing in the amendment." Ibid. 7878 (Sep. App., p. 64). Similarly, Representative Biermann, whose later and somewhat broader proposal was substantially adopted in Section 13 (a) (10) as enacted (83 Cong. Rec. 7401, Sep. App., p. 91), pointed out specifically that he had deleted the word "processing" from his original proposal: "In an amendment I inserted in the accoin yesterday I included the west "processing." I cell attention to the fact that in the pending amendment this word is stricken out." Ibid., emphasis added.

It is thus evident that processing operations, except for those specifically enumerated (i. e. ginning; compressing, pasteurizing, and canning), were deliberately excluded from the minimum wage exemptions for agriculture and agricultural operations.

(3) Further confirmation of the purpose to exclude processing generally from the agricultural minimum wage exemption may be found in the Section 7 (c) exemption (Sep. App., pp. 1-2), from the overtime requirements only, of tirst processing of agricultural commodities. As this Court recognized in the Waialua case (349 U.S. 254), and as the Courts of Appeals have long held, the various exemptions for operations related, to "agriculture" "are in pari materia and must be construed together to form a consistent whole, if possible" (Bowie v. Gonzalez, 117 F. 2d 11, 17

(C. A. 1)). Also, see Stratton v. Farmer's Product Co., 134 F. 2d 825 (C. A. 8)). Section 7 (e), which together with Section 13 (a) (10) establishes an integrated pattern of exemption for activities. closely related to agriculture, provides a 14 workweek exemption from the overtime provisions of the Act for "the first processing; within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations." [Emphasis added] (Sep. App., pp. 1-2). Section 13 (a) (10), on the other hand, grants a complete wage and hour exemption to "any individual employed within the area of production (as defined by the Adaministrator), engaged in handling, packing, storing * * * drying, preparing in their raw or natural state * * * agricultural or horticultural commodities for market.". Since both sections apply to "agricultural or horticultural commodities" and both are restricted to employees omployed within the "area of production (as defined by the Administrator)," the significant difference in language lies in the term "first processing" in Section 7 (c).

It seems plain that the general terms "handling," etc., used in Section 13 (a) (10), do not include any operations (except those specifically named) which properly may be classified as "first processing." Otherwise, the limited exemption in Section 7 (c) becomes meaningless in view of

the complete exemption in Section 13 (a) (10). See Bowie v. Gonzalez, supra, 17 F. 2d at 18-19. The bulking process here would constitute first processing under Section 7 (c), rather than any of the operations listed in Section 13 (a) (310).

(4) The Administrator's interpretation that the tobacco bulking process is not included in Section 13 (a) (10), like the Administrator's regulation defining "area of production" (see *supra*, pp. 32–35), has been ratified by subsequent legislative developments. The interpretation was re²° peatedly stated and published long before the enactment of the 1949 Amendments to the Act,²⁰

Also see Release M-12 of Wage and Thour and Public Contracts Divisions, "Area of Production" As It Applies To Tobacto Industry (Eebruary 28, 1947).

While there may have been some confusion in the original interpretation issued in August 1939 (Laterpretative Bulletin No. 14, Wage and Hour Manual, 1946, p. 180, pars 20, 25, 32 and 33), subsequent published interpretations made it clear that tobacco bulking was not regarded as an operation within Section 13 (a) (10). In addition to the interpretation quoted in the text see, for example, Area of Production; Tabacco, United States Department of Labor, Wage and Hour and Public Contracts Divisions (December 1944); p. 21:

[&]quot;Since fermenting is not one of the operations named in section 13 (a) (10), the employees of packers of eight tobacco are not eligible for the exemption in workweeks in which they are engaged in fermenting tobacco, and since fermented tobacco is not an agricultural commodity, the exemption does not apply to those employees engaged in the handling, grading and packing of fermented tobacco. * * Similarly, employees redrying tobacco for storage and fermentation by their employer are not within the exemption. * *

and was clarified beyond doubt at the time of the issuance of the regulation amending "Area of Production As Used in Section 7 (c) of the Fair Labor Standards Net" on November 18, 1948 (13 F. R. 7347). That regulation stated specifically with reference to the tobacco bulking process:

The amendments * * * are intended, among other things, to make it clear that in Puerro Rico, as elsewhere, bulking of leaf tobacco, which characteristically involves processing operations not mentioned in section 13 (a) (10) of the Fair Labor Standards Act, will not provide a basis for emption under that section * * * [Emphasis added.]. [3 CCH Labor Law Reporter (4th ed.), par. 23,281.]

This clear administrative construction of the exemption was outstanding at the time of the chartment of the Fair Labor Standards Amendment of 1949 (October 26, 1949) and is, therefore, within the scope of Section 16 (c) of that Act which explicitly kept "in effect" outstanding interpretations of the Administrator or the Secretary, not inconsistent with those amendments. See supra, §, 35.

TION, ADMITTEDLY INAPPLICABLE TO RESPONDENT BUDD'S PLANT, IS ALSO INAPPLICABLE TO THE OFF-THE-FARM BULKING FLANT OPERATIONS OF RESPONDENTS KING EDWARD AND MAY BECAUSE THE BULKING PROCESS IS NOT "AGRICULTURE" AS DEFINED IN SECTION 3 (F)

Agriculture, as defined in Section 3 (f) of the Act, includes

farming in all its branches and among other things includes the cultivation and tillage of the soil * * * the production, cultivation, growing and harvesting of any agricultural or horticultural commodities * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The Fifth Circuit's ruling that the bulking plant employees of respondents King Edward and May are exempt, under Section 13 (a) (6) (Sep. App., pp. 2-3), as engaged in "agriculture" (as above defined) is not only inconsistent with this Court's subsequent decision in Maneja v. Waialua Agricultural Co., 349 U. S. 254, but is in direct conflict with the specific intent of Congress to exclude tobacco processing from this exemption, as is unmistakably made clear by the legislative history.

Broad as the Act's definition of "agriculture" is, it nevertheless was designed to exempt only those employees engaged in "genuine, bona-fide farming activity" (81 Cong. Rec., July 27, 1937, pp. 7656-7657). As the Court observed in Maneja v. Waialua Agricultural Co., 349 U.S. 254, 260, although "[the] exemption was meant to embrace the whole field of agriculture * * * " "[n]evertheless, no matter how broad the exemption, it was meant to apply only to agriculture."

· (1) The legislative history summarized supra (pp. 42-46) with reference to the Section 13 (a) (10) exemption is equally applicable to the 13 (a) (6) exemption. In the earlier drafts of these exemptions, the two were included within the same provision and they were invariably considered and debated together. This Court pointed out in Waialua that the Congressional scheme in these two exemptions was to equalize the status of large and small farmers, both provisions being equally concerned with "marking the dividing line between processing as an agricultural function and processing as a manufacturing function" (349 U. S. at 268). Thus, the omission of a processing operation from Section 13 (a) (10) is most significant evidence that Congress "concluded that it also fell outside the agriculture exemption" (lbid.).

No speculation or rationalization is necessary to determine that Congress concluded that tobacco

processing fell outside the agriculture exemption. The specific proposals to exempt tobacco warehouses from both the minimum wage and overtime requirements of the Act, which were repeatedly rejected, were offered as amendments both to the definition of "agriculture" and to the provision which subsequently became Section 13 (a) (10) (see supra, pp. 42–46). The rejection of these specific proposals is, we submit; conclusive evidence that Congress deemed tooacco processing outside the scope of both exemptions.

The Waialus decision recognized that the agrice cultural exemption in Section 13 (a) (6) certainly extends no further than the operations covered by the correlative exemption in Section 13 (a) (10), which was intended to grant an exemption somewhat broader in certain respects than that in Section 13 (a) (6). (349 U. Se at 267-8.) The statutory language defining "agriculture", on its face, suffices to exclude processing operations. It is noteworthy that, with all . the terminology included in the definition, the word "processing" is nowhere used, and indeed appears to have been scrupulously avoided. 'use of the word "practices" in the second branch of the definition of "agriculture" is itself indicative of the deliberate intent to limit the exemption to ordinary farming activities. . "Practices" suggests activities ordinarily carried on by farmers as antincident to their ordinary farming,

and not distinct, highly industrialized processing operations. This is confirmed by the fact that. the original suggestion of a definition of agricul tural labor, submitted by a representative of the 'International Apple Association, included the word "processing." See Joint Hearings on S. 2475 before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., June 2: 1937 to June 22, 1937. p. 1696; Sep. App., p. 44. But the bill reported by the Senate Committee on July 8, 1937, significantly omitted any reference to the word "processing," and substituted the provision on "practices," That this choice of language was meaningful is indicated by the legislative history discussed supra, pp. 42 46, with reference to omission of the word "proces ing" from the corresponding exemption in Section 13 (a) (10)..

(2) The Fifth Circuit's opinion, which was rendered prior to this Court's decision in Wain-lun, relies solely on two factors which, under Wainlun, plainly do not determine the applicability of the agriculture exemption. These two factors are (i) that King Edward and May, at the plants in question, processed tobacco leaf grown exclusively on their farms, and (ii) that the balking process is "essential for the marketing of this type of tobacco. The accuracy of the court's factual assumption on the second fac-

tor is highly questionable." But even if factual accuracy is assumed, both of these factors were at least equally present in Waialua. The agriculture exemption was held inapplicable to Waialua's sugar processing plant (349 U. S. at 264–270) despite the fact that Waialua, like the plants of King Edward and May, processed only its own grown agricultural commodity, and also despite the fact, as this Court expressly noted, that the commodity (unnilled sugar cane) is "unmarketable as such" and "must be processed within a few days of harvesting or serious spoilage will result" (349 U. S. at 257, 265)."

The assumption that the bulking process is ressential for the marketing" of Type 62 tobacco appears for the first time in the opinion of the Fifth Circuit and was not found as a fact by the District Court. Although the evidence on this aspect of the case is not too clear, it does show without contradiction that King Edward purchased from other farmers large quantities of the tobacco which it bulked at other plants. As pointed out in the Statement (supra, p. 9), King Edward bulked approximately 595,901 pounds of Type 62 tobacco in its overall operations during 1951, of which 554,967 pounds had been purchased from other persons who had grown it. In 1950, King Edward purchased tobacco grown by others in the total amount of \$744,262.39, whereas the farm costs for growing tobacco on its rented farms only amounted to \$182,709.80. This evidence strongly indicates that Type 52 tobacco not only can be, but often is, marketed by the farmer in an uncured state prior to bulking.

Indeed, the sugar milling in Waidua was much more essential for marketing of the crop, and much closer in both time and sequence to the actual farming, than is the tobacco bulking in the instant case. For while "unmilled sugar cane is highly perishable and unmarketable as such" (349 I. S. 254, 265), many small tobacco growers apparently sell.

· On the other hand, the factors-ignored by the court below-which this Court heid in Waialua to be most pertinent and significant are equally, if not more, determinative in the instant case. One of the elements especially emphasized by this Court in Whichea, and not considered below, is "what is ordinarily done by farmers with regard to this type of operation." the pertinent consideration being "not the proportion of millers who grow their own cane but the percentage of farmers who engage in milling" (349 U. 8. at 295, 267). The undisputed facts in the present record show that tobacco farmers do not ordinarily perform the bulking operation. Of the approximately 300 farmers who grow Type 62 tobasco in Florida, only 9 maintain and operate their own bulking plants (see Statement, sapra, pp. 7-8). The remaining farmers have their crop processed by others. Thus, Budd, which is an independently operated plant, processed tobacco grown

their tobacco before it has been bulked to processors such as Budd and King Edward. Moreover, while unmilled sugar cane "must be processed within a few days of harvesting or serious spoilage will result," the tobacco in the instant case after harvesting undergoes preliminary barn curing while still on the farm. It is not until after this preliminary barn curing on the farm that the tobacco is taken from the farms to the bulking plant. The bulking process itself, once undertaken, requires from "6 to 12 months or longer" (RK 25; RB 43, 49).

Only 5 of these 9 are engaged exclusively in the processing of their own grown tobacco. The other 1 process tobacco grown by others as well as their own (RK s4A).

by 52 small farmers (RB 148). And King Edward purchased from other farmers almost 60% of the total poundage bulked at its plants during 1951; the cost of the crop purchased from others represented about 68% of its total cost for the 1950 crop processed at its three plants (RK 12–14). See supra, pp. 8–10, 54). These figures are a natural result of the fact, shown by the evidence, that the expensive for ilities and equipment, and the skill, the time and space, needed for this complex process, prevent the ordinary farmer from performing this bulking operation for himself.

Another factor which the Waialua decision emphasized as of particular significance was the "industrial" nature of the operation which "transforms" the commodity "from its raw and natural

^{3.} The proportion of farmers who do not perform this type of processing is every reater in the tobacco industry generally (including non-eigar types). Thus, although there was a total of 563,713 farms in the United States growing tobacco in 1954 (latest available figures from United States Department of Agriculture, CSS, Tobacco Division, January 29, 1955), there were only 163 redrying plants in the United States. United States Department of Commerce, Bureau of the Census, Census of Manufactures, 1947, Vol. 11, p. 149. The redrying plants perform the first off-the-farm operation on non-cigar types of tobacco comparable to the bulking of cigar tobacco. . Like the bulking plants, most of the redrying plants are not owned by a grower-processor but are undependently owned and operated. Yearbook of Agriculture, 1954. I mited States Department of Agriculture, pp. 140-142; United States Department of Agriculture Circular No. 249, American Pobacco Types, L'sex, and Markets (1942), pp. 61,

state - resulting masuch a change [which] is more akin to manufacturing than to agriculture." (349 U. S. at 265, 268). The instant case is indistinguishable from Waralia in this respect also. . There is no question that the bulking plant operation is a highly industrialized process which greatly changes the "raw and natural state" of the freshly cured tobacco that leaves the farm. The tobacco as it comes from the farm is "not tit for human use" (RK 22). The bulking process which converts it late a usable form is not only time-consuming but substantially changes its physical properties and chemical content. "Tobacco is improved in many ways by this processing but the outstanding effects are development of The color of the leaf usually is improved * * The gum of the leaf partially loses its sticky properties. Usually the combustibility of the tobacco is improved. Depending on the extent of greatly weakened" (RK 22-23). Other changes brought about by the bulking process are "a decided decrease in amino untrogen and an increase in ammonia." "substantial losses" of citric and or more of the total originally, present," a reduction of the starch or sugar content of the tobacco and a substantial loss in dry matter (RK 27-28). The tobacco after undergoing these extensive changes is no longer in its "raw and natural state." See the Statement, supra, pp. 6-7.

In sum, the bulking operation, which takes from 6 to 12 months after the tobacco leaves the farm and which requires "a tremendously large amount of valuable and expensive equipment" and "above all, the ability and knowledge of the handling gained only through experience" (RB 42), and which results in such decided changes in the "raw and natural" state of the tobacco is—like the sugar milling in Waialua—clearly an "industrial" operation "more akin to manufacturing than to agriculture." 349 U. S. at 265.

The final significant factor which establishes the parallel between this case and the Waialua sugar mill is the "omission!* * * from the exemption provided by Section 13 (a) (10) for various processing operations performed within the area of production." Maneja v. Waialua Agricultural Co., 349 U. S. 254, 267. While the court below erroneously assumed that the tobacco bulking operation is included in the Section 13 (a) (10) exemption, we have shown supra, pp. 36 % that it is not so included, but on the contrary was deliberately excluded. This Court recognized in Waialua that the purpose of Section

13 (a) (10) was to "equalize the status" under the Act of large farmers who do their own agricultural processing and of small farmers who do not have the equipment necessary for such processing (349 U. S. at 268, 269). As this Court held with respect to the sugar milling in Waiaha, in view of the "congressional scheme" to "equalize the status of all * * * farmers," certainly "Congress would not have omitted * * * [to-bacco processing] from the area of production exemption if it had not concluded that it also fell outside the agriculture exemption" (349 U. S. at 268-269).

CONCLUSION.

The judgment of the Court of Appeals should , be reversed.

Respectfully submitted.

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JAN 1 3 1956

. INDEX TO SEPARATE APPENDIX

Statutes	Page
Fair Labor Standards Act of 1938, as amended.	
c, 670, 52 Stat 1060 c 736, 63 Stat 910 29	
U.S. C. 201), et seq.;	
Sec. 3 (f)	. 1
Sec. 7 (e)	1
Sec. 13 (a) (6)	2
Sec. 13 (a) (10)	2
Portal-to-Portal Act of 1947 c. 32, 61 Stat. 89,	
29 U. S. C. 251, 261; Sec. 12	. 3
Miscellaneous:	
29 CFR, Ch. V, § 536-2 (Federal Register, De-	
cember 25, 1946, 11 F. R. 14648, Li F. R.	
	4
7347). Findings of the Administrator in the Matter of	
the Redefinition of "Area of Production" (De-	
comber 18, 1946)	6
Legislative History of Sections 3 (f); 13 (h) (6),	
and 13 (a) (10) of the Fair Labor Standards	
Act of 1938	40
1. S. 2475, as is troduced in the Senate on	
May 24, 1937, and considered at the	
hearings	41
2. S. 2475, as reported by the Senate Com-	
mittee on Education and Labor, July 8,	
1937 (Seventy-fifth Congress, first ses-	
sion Senate Report No. 884)	45
3. S. 2475, as reported by the House Com-	
inter on Labor, August 0, 1951	
(Seventy-fifth Congress, first session,	•
H Report 0, 1452	. 78
4. Specific proposals to exempt tobacco	
warehouses during the CongressionAl	
dahata an S 2475	100
5 Specific proposals to change the 'area of	
production" exemption during the	
cressional consideration of the Fair	
Labor Standards Amendments of	1.7
1940	133

STATUTES

Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201);

Sec. 3. [52 Stat. 1060] As used in this Act—

(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and fillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Sec. 7. [63 Stat. 913].

(c) In the case of an employer engaged in the first processing of milk, buttermilk,

whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar-keet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into sirup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

Sec. 13. (a) [63 Stat. 918] * * 4.

(6) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply

and storing of water for agricultural pul-

(10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, estoring, ginning, compressing, pasteurizing, thrying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

"Portal-to-Portal" Act of 1947 (c. 52, 61 Stat. 89, 29 U. S. C. 251, 261):

Sec. 12. Applicability of "Area of Propuction" Regulations.—No employer shall be subject to any liability or punishment, under the Fair Labor Standards Act of 1938, as amended, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of an activity engaged in by such employee prior to December 26, 1946, if such employer—

(1) was not so subject by reason of the definition of an "area of production", by a regulation of the Administrator of the Wage and Hour Division of the Department of Labor, which regulation was applicable at the time of performance of the

activity even though at that time the regulation was invalid; or

(2) would not have been so subject if the regulation signed on December 18, 1946 (Federal Register, Vol. 11, p. 14648) had been in force on and after October 24, 1938.

"II

ADMINISTRATOR'S REGULATION

TEXT OF THE ADMINISTRATOR'S REGULATION DEFINING
THE "AREA OF PRODUCTION"

(29 C. F. R. 536.2) (FEDERAL REGISTER, DECEMBER 25, 1946, 11 F. R. 14648, 13 F. R. 7347)

"Area of production" as used in section 13 (a) (10) of the Fair Labor Standards Act.—(a) Any individual shall be regarded as employed in the "area of production" within the meaning of section 13 (a) (10) of the Fair Labor Standards Act in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(ii) With respect to operations on fresh

fruits and vegetables-15 miles;

(iii) With respect to the storing of cottons and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "Open country or rural community", shall not include any city, town or urban place of 2,500 or greater population or any area within:

(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) Three air-line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater,

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or

other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply, within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

UNITED STATES DEPARTMENTS OF LABOR WAGE AND HOUR DIVISION

New York, New York

In the matter of the redefinition of the "area of production" as used in sections 7 (c) and 43

(a) (10) of the Fair Labor Standards Act of 1938.

FINDINGS OF THE ADMINISTRATOR DECEMBER 18, 1946 22

These findings are primarily intended to provide a statement of the major considerations entering into the promulgation of the regulations redefining "area of production." The redefinition of the "area of production" was undertaken pursuant to the order of the United States Supreme Court in the case of Addison et al. v. Holly Hill Fruit Products, Inc. (322 U. S. 607). The specific issue before the Court in that case was the validity of the following definition contained in Regulations Part 536 issued by the Wage and Hour Division?

An individual shall be regarded as employed in the "area of production" within the meaning of section 13 (a) (10) * * * (1) if he performs those operations on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed seven (29 C. F. R. (1940 Supp.) 536.2).

The Supreme Court held these regulations to be invalid on the ground that the "area of production" could not be defined in terms of the

A later revision of this definition increased the permissible number of employees from seven to ten, 29 C. F. R. (1941) Supp.) 536.2.

number of employees in the plant, and remanded the case to the District Court "with instructions to hold it until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress." The Court noted the Congressional intent to distinguish between rural communities and the urban centers and indicated in the following language the general principles for drafting a new definition:

> The textual meaning of Tarea of production" is thus reinforced by its context: "area" calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress. . gave the Administrator appropriate diseretion to assess all the factors relevant to

the subject matter, that is the fixing of minimum wages and maximum hours.

In delimiting the area the Administrator may properly weigh and synthesize all such factors.

Studies were initiated immediately after the Court's decision with a view to promulgating a new definition along the lines indicated in the Numerous conferences were opinion. throughout the country with representatives of labor and of the industries involved. Economic reports dealing with commodities affected were prepared, and a large amount of economic data assembled. More economic material was presented at the hearings. Six formal hearings were held between December 1944 and March 1945 forthe industries concerned with the following commodities: (1) fresh fruits and wegetables: (2) cofton; (3) tobacco; (4) grain; seeds; dry edible beans and dry edible peas; (5) dairy products, poultry and eggs; and (6) miscellaneous agricultural and horticultural commodities not covered by the other hearings. One or more definitions were proposed for discussion at each of these · hearings, but the scope of the hearing included consideration of any other proposals that might be presented.

The invalidated definition had avoided most of the economic discriminations inherent in an exemption of this kind by restricting the exemption to small establishments whose effect on the labors

market and labor standards is negligible. After Ne Supresue Court's decision, a great variety of possible criteria which could be used in defining the "Area of production" for different agricult tural commodities were explored. It was apparent, however, from jumerous studies made by the Division that no valid criteria which could be developed would result in as little economic dislocation as had been experienced under the invalidated definition. The best available criteria for delimiting. "territory in relation to the complicated economic factors that operate between agricultural labor condition and the labor market of. enterprises concerned with agricultural commodities and more or less near their production," and for distinguishing between "rural-agricultural" and "urban-industrial" conditions in accordancewith the intent of Congress were found to be: (1) the distances from which the enterprises obtained. the commodities on which they performed the operations named in the statute; and (2) the nature of the community in which they were located, as indicated generally by a population test.

A definition of "area of production" employing such "population-mileage" criteria kad been in effect for a period of more than a year prior to October 191940. This definition included within the area of production any individual performing the specified operations "on materials all of which come from farms in the immediate locality of the establishment where he is employed and the establishment is located in the open country or in a rural community. "Immediate locality" was limited to distances of not more than 10 miles, and "open country or rural community," was defined so as to exclude any town or city of 2,500 or greater population according to the last avails able United States Census. This definition was abandoned in favor of the definition containing an employee limitation when industry representatives profested that it resulted in numerous competitive inequalities and economic discriminations between establishments located within the "area of production" as so defined, and those outside the "area of production."

Tests based on distance and population were the bases of all but one of the definitions proposed for discussion at the hearing. Ancelternative proposal for fruits and vegetables substituted for the mileage criterion the requirement that the establishment must be located in a county in which the total of the acrenge harvested in all fruits and vegetables is 20 percent or more of the crop land. harvested. It was not feasible, however, to develop suitable criteria of this type for other commodities. Such a test, moreover, did not appear to take into account some of the economic factors involved in defining the area of production. these reasons, and because of other considerations, the definitions proposed for hearings held subsequent to the one for fruits and vegetables did not centain similar proposals. It was finally decided

not to take account of the economic factors reflected by such a test in selecting the pertinent mileages for each group of commodities.

The definition of "area of production" proposed in the notices of hearing for the different commodities were drawn with a view to carrying . out insofar as possible the following objectives: (1) to distinguish generally between establishments operating under "rural-agricultural" conditions and those subject to "urban-industrial" conditions; (2) to indicate for each agricultural commodity or group of agricultural commodities the zones which would be deemed to be "more or less near" the production of the particular agricultural commodity. Efforts were also directed toward eliminating insofar as possible within the framework of the congressional intent and the economic and legal considerations involved, the most serious criticisms of the previous definition which had employed population and mileage as eriferia for exemption.

One of the most frequently urged of the objections to the "10-mile 2,500-population" definition had been that by failing to treat all establishments alike—by denying the exemption to all of them or exempting them all—it placed some establishments at a competitive disadvantage with respect to others. Such discrimination, however, seems to be inherent in the statute itself, which did not exempt all employees in the industries involved,

but only those employed "within the area of production." It is apparent that only a definition which would have the effect of exempting all or none of the employees would entirely avoid this discrimination. That such a definition would be invalid is evident from the statement of the Su-. preme Court in the Holly Hill case that "to hold that all individuals 'engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural comp.odities for market, or in making cheese or butter, or other dairy products' are exempt from the operation of the Act is obviously to fly in the face of congressional purpose. The Act exempts some but not all of the employees engaged in these industries 'It is obvious therefore that some discrimination, in theseense that some establishments will not meet the test for exemption, must inevitably result from any valid definition.'

Although this could not be taken into consideration in formulating the definition, it was apparent from the evidence presented at the hearings that such discrimination had become largely academic in nature. Representatives of industry after industry testified that the minimum wages paid exceed the minimum currently required by the Fair Labor Standards Act and that consequently the industry would not be required to increase wages by reason of failure to qualify for exemption under section 13 (a) (10). There was testimony to the effect that the establishments concerned would incur some cost for overtime if they failed to enalify for exemption. However, it was clear that relatively few establishments could take full advantage of the overtime exemption provided in the "area of production" sections of the Act,

The descritions proposed for consideration at the hearing, while adopting population and distance from which commodifies are received as basic criteria for exemption, which included modifying factors, were designed to reduce the impact of discriminations that had resulted from the "10-mile, 2,500-population" definition previously in effect. The 2500-population test was retained in the definitions proposed for discussion at the hearings despite previous objections to it because it came closer to accomplishing the objective for which it is intended than any other known test; and because it has been the dividing line between rural and urban communities used for many years by the Bureau of the Census and other agencies of government. One serious objection related to the competitive discriminations which arose in cases: where plants located within the city limits of a town of more than 2,500 population were not exempt, while some of their competitors who hap? pened to be located across the boundary line of the same town were exempt. In many instances, it could obviously not be said that the boundary of the town marked the dividing line between estab-

in view of the unionization which had taken place in the last few years and the fact that most affected industries have 14 weeks, 28 weeks and in some instances year round exemptions from overtime under other provisions of the Act. Rising wage rates and the spreading practice of paying premium rates of overtime since the hearings have reduced even further the number of establishments that could derive any material benefit from either the minimum wage or overtime exemptions provided for plants in the area of production.

lishments aperating under rural rather than uroun labor conditions. Justead it appeared clearly that the influence of the town on the inasket for labor, as well as on wage levels and related conditions; extends for some distance into the surrounding area. To minimize the discrimination, resulting from this particular type of competitive situation, the definition of the terms Sopen country and "rural community" in the proposed definitions included areas suprobleting the towns as well as the towns. For purposes of the hearings the size of the surrounding areas assumed to be within the influence of the urban community and hence excluded from the definition of rural conf munity or open country ranged from 3 miles, to 20 miles depending upon the population of the town or city.

The objections to 10 miles as a universal distance denoting nearness to source of supply were also recognized in the proposed definitions by (1) varying the allowable distances on the basis of population density for some commodities, permitting greater distances in the more sparsely populated areas and shorter distances in the more thickly populated areas; and (2) increasing permissible distances for most commodities to indeages believed to be more consistent with the graving radius of plants operating within their own producing areas, while at the same time giving due weight to the many 'complicated economic factors that operate between agricultural labor: conditions and the labor market of enterprises concerned with agricultural gommodities and more or less near their production." Thus, in addition to the other requirements, mileages varying from ten miles for some agricultural commodities under certain conditions to as much as 50 miles for other commodities were proposed for consideration at the hearings.

Another objection to the previous "populationmileage" definition was the requirement that all of the commodities received by the exempt establishment had to come from farms within the specified distance from the establishment. As a result of this requirement, it had been pointed out, a farmer located in an area remote from an exempt plant might be deprived of the opportunity of marketing his products, since the exempt. establishment would lose its exemption if it handled his crop. The validity of this objection was recognized in the definitions proposed for discussion at the hearings by including a provision permitting 5 percent of the commodities to come from beyond the specified mileages without defeating the exemption.

Alternative proposals submitted at the hearings or in post-hearing briefs by employer organizations were quite generally designed to exempt all or practically all establishments in the particular industry or branch of the industry represented. In general, the employer-proposed definitions did not differentiate between rural-agricultural and

urban-industrial conditions. A number of the proposals, moreover, were of at least doubtful legality when considered in the light of the majority opinion in the Holly Hill case. One type of definition proposed by industry representatives would have had the effect merely of striking the words "area of production" from the Act. Others · merely named all the counties in which any appreciable amount of the commodity is grown. These proposed definitions would have exempted everyone engaged in the named operations with possible exceptions in instances which seem to be extremely rare. Some organizations adopted the general criterion of distances from which commodities are received, but proposed mileages so broad as to include all establishments within the exemption. One novel but hardly practicable proposal was made that the Administrator refrain , from defining area of production, leaving the question to be decided by the courts in each individual instance.

Some labor representatives on the other hand proposed definitions which they admitted frankly were designed to deny the exemption to all but a very few establishments. One proposal made by labor representatives adopted the population-mileage criterion, but restricted the area from which the establishment could draw its commodities to 5 miles, and included within the exemption only establishments which were in the open country or in rural communities with population of the country or in rural communities with population.

lations of less than 500, and which had annual sales of less than \$20,000. One labor organization proposed that 500 population and 2 miles be the test. Another labor proposal would have required the Administrator to determine in each individual case whether the establishment was in the area of production and would have made the tests for exemption so restrictive that probably no establishment could have qualified.

The objections to the definitions proposed for discussion as the hearings were in general directed to the fact that they would result in discriminations because they did not have the effect of exempting all or a sufficiently large proportion of the establishments in a particular industry or part of an industry represented at the hearing. Much of the testimony at the hearings was directed to showing that particular establishments or groups of establishments in one or another sections of the country would not qualify for exemption under the proposals contained in the notices of hearing. The reasons why such effects are inevitable under any valid definition have been indicated above, and no valid method of completely eliminating them appears to be possible. To the extent possible within the legal and economic limitations of the problem, the criticisms and suggestions which had merit have been taken into consideration in formulating the final definitions.

That portion of the proposed definitions which defined "epen country" or "rural community" in terms of a population of less than 2,500 was also attacked. It was argued by some that the population of a community does not determine whether: it is agricultural or industrial in character, and examples were cited of towns of more than 2,500. which were said to be predominantly agricultival in character, and of towns of less than 2,500 which were obviously industrial. However, no better criterion for accomplishing the objective of distinguishing establishments subject to "urban-isdustrial" conditions from these under the influence of "rural-agricultural" conditions was developed at the hearings. Independent investigation by the staff of the Wage and Hour Division, as well as consultation with experts of the Department of Agriculture and other Government bureaus, moreover, failed to develop any administratively feasible substitute for population as a test of urbanization and industrialization; the course of the investigation and study of this problem, consideration was given to a number of such possible alternatives to the population test as the major source of income of the town (e.g., whether agricultural or industrial) and various types of criteria indicating the extent of industrial employment in relation to employment in the handling and processing of agricultural commodities, but all were found to be impracticable and were

abandoned. An analysis of all the available data indicated, however, that while the size of a town is not a perfect criterion of its urban or industrial character, it is nevertheless the best available test, and leads to results which in general are accurate enough to warrant its adoption.

Even those who conceded the propriety of using a appulation test to distinguish plants operating under "rural-agricultural" rather than "urbanindustrial" laber conditions argued, however, that a population of 2,500 was not the proper dividing line. Representatives of industry attacked the figure 2,500 as too small, while labor representatives insisted that it was too large. · Examples were given of communities with populations considerably in excess of 2,500, in which, it was contended, labor conditions were not different from those in towns of less than 2,500. Examples were cited of towns of larger population than 2,500 which were said to be predominantly "agricultural" in the sense that they were dependent upon the surrounding agricultural areas for their economic existence and the 'principal activities were related to the handling or processing or agricultural commodities or of otherwise se ving the farmers in the surrounding community. Repre-'sentatives of employer groups advanced proposals that the population line be drawn at various figures ranging up to 100,000 or more. Some employer representatives suggested that only terminal or market cities be excluded from the area

of production. At the other extreme, labor representatives pointed to the wide-spread industrialization in towns of less than 2,500 and proposed that establishments be considered outside the "area of production" if they were located in communities with populations in excess of 500 persons.

An analysis of the proposals advanced by representatives of employer groupsat the hearings as substitutes for the proposed 2,500 population test, indicates that in most instances they were designed to exempt all or practically all of the establishments represented by the particular group making the proposal. While the 2,500 population test was criticized by employer representatives because it excluded some towns of larger population which were said to be agricultural in character, the alternatives proposed by . them would have had the equally objectionable. effect of including within the area of production an even greater number of clearly industrial towns. The proposal of labor representatives that the dividing line be drawn at communities with populations of 500 persons, would have excluded all of the urban industrial communities: from the area of production, but would also have excluded a disproportionate number of truly rural and agricultural communities.

It seems reasonable to conclude from the record and all the available evidence that the tests proposed at the hearings as substitutes for the 2,500

population criferion are subject to at least as many objections as have been levied against the 2,500 population test. Although it is clear that any line attempting to distinguish between "urban-industrial" and "rural-agricultural" communities-on the basis of population can at best be only an approximation, it is equally clear that none of the proposals advanced at the hearing would accomplish the objectives of such a test with as much accuracy as the 2,500 population test. As a class, places of 2,500 population or more are predominantly industrial, while places with populations of less than 2,500 are predominantly agricultural. A population limit of 2,500, moreover, has for over 35 years been the official dividing line between "rural" and "urban" employed by the Bureau of the Census in its studies. This dividing line has also been accepted and used in studies made by the Bureau of Agricultural Economics, the Federal Emergency Relief Administration, the Works Progress Administration and other government agencies. It has furnished the definition of "rural" communities which has been the basis of studies of rural and urban communities by many sociologists. It has been incorporated into statute by the Congress of the United States in special legislation for rural communi-To a very great extent the handling and

^{&#}x27;See, for example, 30 Stat. 356; 40 Stat. 1189, "an act appropriating funds for the construction of rural post roads." On the other hand the Rural Electrification Act (7 U.S.C.A.

processing of agricultural and horticultural commodities is carried on in the open country or in towns of less than 2,500. For example, only about 10% of grain elevators are located in towns of 2,500 or more. Only about 11% of cotton gins are located in such populated places. About two-thirds of all fresh fruit and vegetable canning and packing, cheese manufacturing and poultry and egg assembling are carried on in the open country or in towns of 2,500 or less.

On the basis of all the evidence, it is my conclusion that a population test of 2,500, while not drawing a line between "urban-industrial" and "rural-agricultural," conditions with a fine precision, will come as close to accomplishing this objective as it is possible to come in a general rule applicable to many situations.

Objections were also voiced at the hearings against those portions of the proposed definitions which excluded from the area of production establishments located within specified distances of population centers, the distance increasing with the population of the city or town. Under the proposed definitions, establishments were excluded from the "area of production" if they were located within 3 miles of towns with populations between 2,500 and 10,000, 6 miles from towns of

Sec. 013) defines "rural area" as "any area of the United States not included within the boundaries of any city, village or box agh having a population in excess of fifteen hundred nanadatants.

10,000 to 25,000, 10 miles from cities between 25,000 and 100,000 and 20 miles from cities of 100,000 population or more. One purpose of this requirement, it will be recalled, was to meet one of the objections raised to the "10-mile 2,500-population" definition which had previously been in effeet; that it frequently discriminated against employers located within the limits of the town while giving a competitive advantage to employers who moved their establishments just beyond the boundary in order to avoid paying municipal taxes or for other reasons. It was apparent, moreover, that the influence of an urban community does not end at the political boundary, but extends for some distance beyond it into the surrounding area. The distance over which the influence extends depends upon a variety of factors, but is related with a fair degree of acouracy to the population of the city. The rationale for such a test appears to have been supported by the

This has long been recognized by the Bureau of the Census in its demarcation of metropolitan districts to include certain settled areas contiguous to cities. A district of this type, the Bureau found "tends to be a more or less integrated area with common economic, social and often, administrative interests." Serious consideration was given to the adoption of surrounding areas of these metropolitan districts in lieu of the bands proposed at the hearings. This was abandoned in favor of specific mileage bands, however, because the areas included within these metropolitan districts reflect the influence of some factors which are not pertinent to the problem of defining "area of production" and also because no data are available with respect to metropolitan districts for cities of less than 50,000 population. See Census of Population, 1940.

facts, which indicated that it would tend to elixinate competitive discriminations of the most serious kind, by excluding from the "area of production" establishments which are subject to "urban-industrial" labor conditions although, not located within pentical boundaries of cities or towns. The testimony at the hearings indicated, however, that the distances specified in the proposed definitions were greater than was necessary to accomplish the desired purpose, since they had the effect of disqualifying some establishments which were too far away from the town to be within its influence. Census data on metropolitan districts and other available information, moreover, tended to support this test mony. evidence indicated that the urban influences tended to extend roughly one mile outside of the limits of cities with populations between 2,500 and 50,000, three miles from cities between 50,000 and 500,000, and five miles from cities of 500,000 or over. The definition of "area of production" which has been adopted therefore excludes establishments located within such distances of cities, towns or urban places with the specified populations. These distances tend to reflect the direct influence of the urban community upon the surrounding area.

The Congressional purpose of restricting the exemption to establishments located "more or less near" the production of the agricultural conf-modity has been recognized in the definitions of

"area of production" adopted since the effective date of the Act. The test of nearness to the Jarms on which the commodities are grown was made a part of the very first definition of "area of production" issued in October 1938, in the requirement that the establishment must receive its agricultural or horticultural commodities from farms in the immediate locality." Special definitions for dry edible beans and for Puerto Rican leaf tobacco recognized this principle in the requirement that the exemption apply only to employees at the place where these products were first assembled from nearby farms. A later definition for fresh fruits and vegetables defined the term "immediate locality" more specifically in terms of a distance of 10 miles or less. In 1939, "immediate locality" was broadened to "general vicinity," but no exact definition of the term was included within the regulations defining "area of production." Court decisions holding parts of the definition of "area of production" to be invalid did not upset that portion of the definition which required that all commodities come from "the general vicinity" of the establishment in order that the employees qualify for exemption. The provision of one of the previous definitions restricting the distance to 10 miles and requiring that all of the commodities come from within that distance seems to have been approved as valid by the United States Supreme Court in the Holly Hill case. Thus the courts appear to have sustained the validity of employing a test that related the proximity of the establishment to the farms producing the commodities it handles.

Nevertheless, the use of a mileage criterion was opposed by some groups at the hearings, particularly those having members who did not operate entirely within one producing area but reached out over great distances to obtain the materials needed to operate their plants. Other groups argued that a mileage criterion could be employed only if it were great enough to include all establishments. For example, the representative of the cotton compressors opposed the use of a mileage criterion, pointing out that many compress operators receive their cotton from very great distances, and taking the position that a cotton compress should be entitled to the exemption even if it received cotton from a foreign country. representatives of the tobacco redrying industry also opposed a mileage criterion unless the mileage used was a "large figure." The testimony disclosed that some redrying plants located in the tobacco growing region of North Carolina receive tobacco for redrying from producing areas in the State of Georgia. Consequently, this group was opposed to any mileage test which would not exempt North Carolina plants reaching into Georgia for their bacco.

An analysis of the available data indicates quite clearly that the longest hauls of agricultural or horticultural commodities normally occur when

the commodity is moved to an establishment which has not been located principally to serve the nearby farms, but for reasons involving nearness to terminal facilities, markets, labor supply or other such considerations. The most striking instances of this kind of establishment are the large cotton compresses located in cities having port facilities which are principally established there for convenience in handling cotton for water transportation and the export trade. Such compresses reach out over hundreds of miles for the cotton handled by them, and, incidentally, generallý opérate in large cities under urban-industrial conditions. Their relationship to the farmer and to agriculture is considerably more remote, for example, than that of the cotten gin, the warehouses, and, even the inland compresses. establishments in other industries or branches handling agricultural commodities also reach out beyond their immediate producing areas and obtain greater or lesser amounts of the commodity they handle from other producing areas. number of such establishments varies with the different commodities or industries and may vary in different sections of the country and from time to time.

The distances from which establishments receive their commodities reflect to varying degrees the influence of significant economic factors, many of which are pertinent to the complex task of determining the kinds of establishments that should or should not be exempt from the minimum wage or overtime provisions of the Act. Consequently, one of the major tests adopted for delimiting the zone within which the pertinent economic influences may be deemed to operate and outside of which they lose their force, is the distance from which establishments in the various industries receive the commodities upon which they perform the operations specified in sections 7 (c) and 13 (a) (40) of the Act.

The selection of appropriate distances for the different commodities and groups of commodities has been no easy task, and was accomplished only . . after carefully weighing and synthesizing a large variety of complicated economic factors. Among the many factors taken into consideration were the following: the kind of crop; the distances from which the establishments in each industry receive the agricultural or horticultural commodities upon which they perform the operations specified in the pertinent sections of the Act; the geography and topography of the various sections of the country in which the different commodities are normally produced; the location of the plants within these areas: the concentration of cuitivation of the different commodities in valuous sections of the country; the pattern of concentration of agricultural production with respect to the location of the establishment; differences in pracfarming areas; the perishability of the commodities received; the extent to which the plants deal with a single commodity rather than a variety of commodities; the nature of the operations performed on the commodities received, including the degree of industrialization of the various operations; the number of hands or operations through which the particular commodity has moved since leaving the farm, including the possibility of passing increased labor costs back to the farmer; the marketing practices of the particular industries; and the wage rates paid, and overtime practices in the various communities concerned with particular commodities.

On the basis of all the evidence, it is my conclusion that the operating distances which may be considered "more or less near" the establishment with respect to particular industries or commodities and which (to the extent that this can be accomplished by a distance test) most nearly delimit the zones within which the pertinent economic influences operate, are as follows:

- (a) the ginning of cotton-10 miles;
- (b) all operations on fresh fruits and vegetables—15 miles;
- (c) the storing of cotton and any operations on commodities not otherwise specified—20 miles;
- (d) the compressing and compresswarehousing of cotton and operations on

tobacco (except Paerto Rican teat tos bacco) grain, soybeans, poultry or eggs— 50 miles.

In arriving at these distances the weighing of the many factors had to be accomplished with the best data available for the particular industries. Some grouping and averaging was pressury, moreover, since it was not feasible to develop one or more separate distance requirements for each of approximately 300 affected commodities. It is inversely specified in the definitions will in general accomplish the required objectives,

Complicating the task of determining the appropriate distances from the establishments to the farms on which the commodities were produced was the fact that some of the operations specified in the statute are two or more stages removed from the farm. At each successive stage it is increasingly difficult to idente the farms on which the commodities had their origin. At each successive stage, moreover, the commodities may be expected to be further removed from the farms on which they were grown. Some allows

The definition of the "area of production" of Pherto Rican leaf tobacco involves a number of very complex special problems, which make it desirable to consider that commodity separately. Consequently, the previous definition will be left in effect until such time as a separate heaving can be held with respect to it.

ance was made for these factors in selecting the particular distances applicable to each commodity. or group of compodities. It was also found necessary, however, to develop some method of making reasonably sure that commodities which are received from other handlers or processors rather than directly from farms were produced on farms more or less near the establishment. This might be approximated by a requirement that the establishment from which the commodities came must Talso be operating within the "area of production" as defined: It was not considered practicable to establish such a requirement in view of the difficulty of ascertaining the facts regarding the operations of the supplying establishments. Available evidence indicated, however, that the supplying establishments which we're located in the open country or in rural communities were more likely to receive the commodities from nearby farms than establishments not so located. The "distance" test was therefore drafted in terms of receipts from "normal rural sources of supply" which have been defined to include certain other establishments as well as farms. Thus, the receipt of commodities in accordance with this test may be established by showing that the commodities were received from any of the following. sources within the specified distances: (1) farms; (2) farm assemblers or other customary supplying establishments (a) located in the open country or in a rural community, or (b) not located in

the open country or in a rural community provided it is shown that the commodities actually originated on farms within the specified distances from the establishment claiming the exemption.

A tolerance of 5% has been included in the definition in order to allow the exemption to apply despite receipt of an occasional shipment from a remote farmer or from an urban source, or a source which cannot for one reason or another be determined. This tolerance applies to the total combined receipts for the period tested. An establishment may therefore quality even if the receipts of one or more commodities from disqualifying sources or distances exceed 5%, provided that the total receipts from disqualifying sources or distances do not exceed 5%, of the total receipts of all commodities.

The period for determining whether 95°, of agricultural or horticultural commodities are received from normal rural sources of supply within the specified distances will ordinarily be the last preceding calendar month of operation in which the establishment has operated for at least two workweeks. In the case of establishments performing the specified operations on the particular commodities for the first time, the period will be the total time during which the establishment has so operated, until the required calendar month of operations has elapsed. The preceding calendar month is considered to be the most practicable period for applying the test. It provides a more

stable basis for the test than a weekly period, yet will reflect the nature of current operations with much greater accuracy than would the preceding calendar year, which was the period contained in the definitions proposed for the hearings.

On the basis of the considerations discussed above, it is my conclusion that the definitions of "area of production" which will best carry out the objectives of Congress as indicated in the legislative history of sections 7 (c) and 13 (a) (10) of the Fair Labor Standards Act, and which, to use the language of the Supreme Court, will accomplish the appropriate "delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production," are as follows:

"Area of Production" as used in Section 7
(c) of the Fair Labor Standards Act

(a) An employer shall be regarded as engaged in the first processing of any agricultural or horticultural commodity during seasonal operations within the "area of production" within the meaning of Section 7 (c) if he is so engaged in an establishment which is located in the open country or in a rural community and in which such first processing is performed on commodi-

The special definition for Puerto Rican leaf tobacco is not set out here since no change has been made. See note page 31, supra.

ties 95% of which come from normal rural sources of supply located not more than the following air line distances from the establishment:

(1) with respect to grain, soybeans, eggs, or tobacco (other than Puerto Rican leaf tobacco)—50 miles;

(2) with respect to any other agricultural or horticultural commodities—20 pailes.

(b) For the purposes of this regulation:

(1) "Open country or rural community" shall not include any city; town or urban, place of 2,500 or greater population or any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

three air line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000 or

five air line miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily meves, which are within such specified distances and located in the open country or in a rural community, or (iii)

from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95% of the agricultural or horticultural commodities are received from normal rural sources of supply, shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

"Area of Production" as used in section 13 (a) (10) of the Fair Labor Standards Act

(a) An individual shall be regarded as employed in the "area of production" with in the meaning of Section 13 (a) (10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, prepar-

ing in their raw or hatural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

- (1) if the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:
- (i) with respect to the ginning of cotton—10 miles:
- (ii) with respect to operations on fresh fruits and vegetables—15 miles;
- (iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles:
- (iv) with respect to the compressing and compress-warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, poultry or eggs 50 miles.
 - (b) For the purposes of this regulation:
- (1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or five air line miles of any city with a popu-

lation of 500,000 or greater

according to the latest available United States Census.

- (2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other estab-Tishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.
- (3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.
- (4). The percentage of commodities received from normal rural sources of supply

within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

In concluding this explanation of the considerations entering into the definition of the area of production, I want to make it clear that I am far from satisfied with the definition since employers engaged in the same activities and employees engaged in the same type of work will have unequal rights and obligations under the Act. Such results are unfortunately unavoidable since they arise from the language and theory of this section of the statute itself. In drafting the sections of the Act dealing with "area of production" Congress did not define the exact scope of the exemption, and · delegated the task of defining it to the Administrator. It is clear that Congress intended to exempt only those establishments performing the specified operations within the area of production, while leaving within the scope of the minimum wage and overtime provisions of the Act those establishments performing the same operations outside of the area of production, andconsequently that some economic discrimination as between establishments within the exemption and those outside of it was also

within the intent of Congress. I am frank, to say that this economic discrimination leading only to competitive inequalities is not only adminstratively very difficult but basically unfair and seems to me unsound public policy. Since the previous definition which to a considerable degree minimized these inequalities has been held invalid it is obvious that the only satisfactory solution is a legislative revision of sections 7 (c) and 13 (a) (10) of the Act. I have elsewhere indicated my views on this and I hope the Congress will take quick action. In the meantime I can only do my immediate duty in carrying out conscientiously to the best of my ability the mandate laid upon me by the .Congress.

(S) L. METCALFE WALLING,
Administrator.

December 18, 1946.

III

AND 13 (A) (10) OF THE FAIR LABOR STANDARDS ACT OF 1938

The purpose of this portion of the Appendix is to trace the legislative history of Sections 3 (f), 13 (a) (6), 13 (a) (10), and the provisions relating to the term and concept "area of production" which is found in Section 13 (a) (10) of the Fair Labor Standards Act.

1. S. 2475, as introduced in the Senate on May \$\inspec 24, 1937, and considered at the hearings

For convenience, this discussion will refer only to S. 2475, although a companion bill containing substantially the same terms was introduced in the House at the same time.

As introduced, S. 2475 contained no provision using the words "area of production." The only provisions relating to agriculture were in Sections 2 (a) (7) and 19. Section 2 (a) (7) defined "employee" as not including "any person employed * * * as an agricultural laborer as such terms are defined and delimited by regulations of the Board." Section 19 conferred authority on the Board to make regulations, among other things, defining and delimiting employment in which persons are deemed to be employed as agricultural laborers.

 □ Joint hearings of the bill were held before the Senate Committee on Education and Labor and the House Committee on Labor, June 2, 1937, to June 22, 1937.

At the hearings, various witnesses urged that some allowance be made with respect to the maximum hours provision of the bill for employees engaged in handling, packing, processing, etc., perishable fruits, vegetables, or fishery products (Hearings, pp. 152, 373, 967, 1059, 1220).

Several witnesses urged that the agricultural exemption in the bill be broadened. Mr. Horace

Herr, representing the National League of Wholesale Fresh Fruit and Vegetable Distributors, urged that Congress should draft the formula for drawing the line between agricultural and industrial activities. He stated:

In section 2 (a), in connection with the definition of "employee," in paragraph 7, lines 3 to 11, page 4, the question is raised as to whether the Board should decide where the line should be drawn between agricultural labor and labor within the scope of the act, or Congress should draw Is it the congressional intent that this program shall be as inclusive as possible or that its application should be restricted so as to impose none of its obligations upon employers engaged in activities directly affecting agriculture or inseparably intertwined with agriculture in the marketing processes? It may be that wherever the line is drawn, some injustices may result both to the employees, on the exemption side of the line, and to the employers, on the inclusion side of the line, the injustices to the latter resulting from the labor-cost differential. This question is of some importance in this industry, where the commodities move in their natural state, where certain handling operations are dictated by the highly perishable character of the commodities, and where actual ownership, to a substantial extent, remains with the producer until the commodities are bought by the retail outlet; when the cost of grading, packing, loading

for shipment, storage; and other marketing expense is charged back to the grower. There is involved in this question the cooperative packing plants and marketing associations and the movement of commodifies, such as apples, into and out of storage. In the Social Security Act, agricultural labor is exempt and the definition of agri- o cultural labor rests with the Commissioner of Internal Revenue. There has been considerable pressure to liberalize the definition. In the [wholesale] fruit and vegetable [distribution industrys] code, as approved by both N. R. A. and the Agricultural Adjustment Administration, the line was drawn at the point where the commodity was on board the transportation facility, the code language being as follows:

"The industry as defined shall not include the production nor preparation, assembling, or loading at point of production

of commodities for shipment.

It would seem that fixing the limit on agricultural activities, in a program of this kind, so directly relates to the national policy for agriculture, that the Congress, rather than the Labor Standards Board, should draft the formula for the dividing line. The Congress, at least, should say whether the doubt is to be resolved in favor of the workers or in favor of the farmers (Hearings, pp. 1002-1003).

Mr. John H. Clippinger, representing the same organization, also urged that the bill be amended so as to draw a clear line of demargation between

an agricultural and nonagricultural laborer so as to avoid confusion resulting from the definition of agricultural laborer under the Social Security Act (Hearings, p. 1064).

Mr. Samuel Fraser, representing the International Apple Association, objected to the provisions of the bill which empowered the Board to define agricultural laborer. He contended that—

All of the costs and charges of packing, packaging, washing, grading, conservation, putting the commodities on board some transportation agency for transportation to market, in the end come squarely out of The pocket of the grower (Hearings, p. 1084).

He suggested the inclusion in the bill of the following definition of agricultural labor:

For the purpose of this act, the term "agricultural labor" includes all employees engaged in the planting, growing, spraying, harvesting, preparing for market, packing, conserving, processing, transporting, and marketing of fresh fruits and vegetables, and their delivery to storage or to a carrier for transportation to market, no matter by whom employed (Hearings, p. 1096).

Mr. W. S. Campfield, representing the Virginia State Horticultural Society, urged that the uncertainty inherent in the definition of agricultural labor be removed, and that "agriculture should be either all in or all out to avoid conflicts." He called particular attention to the dissatisfaction that would be occasioned by holding that a packing crew was within the provision of the bill while those engaged in picking fruit were exempt. He urged the adoption of the amendment proposed by Mr. Fraser.

Mr. Idus T. Gillett of the Dowlett Packing Co. of Canutillo, Texas, suggested that an exemption be given small canners operating in rural communities and employing fewer than twenty regular employees on a "year-round basis." He stated that raising wages in a cannery located in an agricultural community substantially above the prevailing wage in the community would cause chaos (Hearings, p. 1219).

Mr. Clippinger also argued that the exemption of employers with a small number of employees would upset the wage structure in the wholesale fruit-and-vegetable-distributing industry.

2. S. 2475, as reported by the Senate Committee on Education and Labor, July 8, 1937 (Seventy-fifth Congress, first session, Senate Report No. 884)

The Senate Committee on Education and Labor rewrote the bill, reporting an amendment in the nature of a substitute for the original bill.

In the amended bill the agricultural exemption was enlarged but the term "area of production" was not used.

The agricultural exemption, appearing in Section 2 (a), (7), read as follows:

nor shall "employee" include any person employed in the taking of fish, sea foods, or sponges; or any person employed in agriculture. As used in this Act. the term "agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and: growing of fruits, vegetables, nuts, nursery-Froducts, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in subdivision (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and, any practices ordinarily performed by a farmer as an incident to such farming operations.

The report accompanying the bill contained only a brief statement that employee is defined so as to exclude—

persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations (75th Congress, first session, Senate Report No. 884). Senator Black, chairman of the committee in charge of the bill, in opening the Senate debate on the bill, stated that it—

specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most/comprehensive definition of agriculture which has been included in any legislative proposal.

We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture (11 Cong. Rec., July 27, 1937, p. 7648).

Senator Tydings raised the question whether under the definition of agricultive an employee threshing wheat on another man's farm would be exempt (81 Cong. Rec., July 27, 1937, p. 7653). The exemption of seasonal teanneries was discussed at pages 7655 and 7656.

The meaning of the word dairying as used in the agricultural exemption was the subject of a colloquy between Senator Pope and Senator Black which appears at page 7656.

The concept of 'area of preduction' was first injected into the debate by Senator Copeland

who read a telegram from the International Apple Association urging that the definition of agriculture be amended by adding the following:

Or by an employee in connection with preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities (81 Cong. Rec., July 27, 1937, p. 7656).

Senator Copeland continued:

That is the proposed amendment: The argument is this:

"This amendment applies only to fresh fruits and vegetables in their raw and natural state wi in the area of production and does not extend to canning or process-· ing or any operations which change them from their raw or natural state. The amendment would then make paragraph 7 the same in principle as recognized by N. R. A. and A. A. A. and under which the fresh fruit and vegetable industry operated. Under modern conditions, developed by necessity, it is of utmost importance to multitudes of small growers from coast to coast that packing-house operations and storing within the area of production be exempted; otherwise, community packing and uniformity of grade will be disrupted and, moreover, small individual growers are not in position to equip themselves with highly expensive washing and grading machinery. All of

these costs come out of growers' pockets. Bear in mind we are asking that the amendment apply only to fresh fruits and vegetables which are highly perishable and in their raw and natural state only, and within the area of their production. There is well-established precedent for this under the carefully considered position taken by N. R. A. and A. A. A. (81 Cong. Rec., July 27, 1937, p. 7656).

Senator Black replied that-

The committee, after careful consideration reached the conclusion that the definition of employee as given in paragraph (7) of section 2, and which is the broadest definition that has ever been included in any one act, was sufficient to include every genuine bona fide farming activity (81 Cong. Rec., July 27, 1937, pp. 7656–7657).

So far as I recall, no member of the committee favored exempting, for instance, meat-packing houses. I use that as an iffustration and not that it is connected with the suggestion made by the Senator from New York. The committee was not in favor of exempting the packing business as it related to many agricultural products. I refer to packing as a business. The farmer or the apple grower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming neighbors, I should say (81 Cong. Rec., July 27, 1937, p. 7657).

In response to questions by Senator Overton as to whether cotton ginning or sugar processing, if done by a farmer on a farm, would be exempt, Senator Black indicated that the test would be whether such processes were "ordinarily performed by a farmer as an incident to his farm operations" (81 Cong. Rec., July 27, 1937, pp. 7658-7659).

Senator Schwellenbach indicated that the bili pat the small apple grower at a disadvantage. He stated:

If I may, I should like to follow through some of the questions asked by the Senator from New York [Mr. Copeland] which the Senator from Alabama answered by reference to the growing and sale of water-melons.

When an apple grower picks his apples and takes them into his own warehouse, as the Senator from New York has described, and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is no dispute about the fact that it is an agricultural operation. I should like to say frankly, however, that when he takes the apples into market and sells them on the streets of New York City, as the Senator points out, I cannot see that is an agricultural operation.

What I am interested in is the small apple producer who has a ranch so small.

that he cannot afford to maintain upon his own ranch a warehouse with the necessary machinery and equipment which such warehouses now must have under the rules and regulations of the Department of Agriculture on the question of spray tolerance. It seems to me that the bill, under the definitions as they now stand, places at a considerable disadvantage the man who is too small an operator to perform these operations upon his own farm, and who must send his apples to a central warehouse to have the same processing done-by "professing" I do not mean canning; I mean the removed of the spray-and the same sort of storage, and who must bear all these increased costs, as compared with the larger operator who can do these things upon his own place of business.

I cannot see anything fair about that sort of discrimination. It seems to me the point of difference should be when the agricultural operation stops.

The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the packing of the apples are all agricultural processes. If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central ware-

house, or who may join with others in cooperative warehouses and there have the same processes performed.

I think—and I should like to ask the reaction of the Senator from Alabara to the suggestion—that the line of distinction might be made at the point of agricultural operation; that so long as the operation is purely an agricultural one, it should come within the exemption. When it becomes a processing operation, a canning operation, it ceases to be an agricultural operation. When it becomes a marketing operation, and the product gets to the railroad station, or leaves the warehouse for the purpose of going to the railroad station, it ceases to be an agricultural operation.

I should like to have the Senator's reaction to that suggestion.

Mr. Black. I think perhaps I can give the Senator an illustration which will demonstrate how difficult it is to draw the line, at the point he mentions.

Going into another phase of farming, let us take the man who raises hogs. A great many farmers who raise hogs kill their hogs on their own farms. They prepare the hogs for market on their own farms and then send out the product. As the bill is framed, there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; but if we should attempt to draw the line of distinction which the Senator has mentioned we would find that we should have to exclude meat packers, whom I know the Senator would not believe it desirable to exclude, and we should thereby step into a field which we do not wish to enter (81, Cong. Rec., July 27, 1937, p. 7659).

Senator Reynolds suggested that an amendment exempting employers of ten or less employees would allay the fears of those who believed that small canners should be exempt (81 Cong. Rec., July 27, 1937, p. 7662).

The concept of "area of production" was proposed by Senator Schwellenbach in an amendment which would add to the definition of agriculture the following:

the term "person employed in agriculture," as used in this act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state (81 Cong. Rec., July 30, 1937, p. 7876).

The following discussion took place on the proposed amendment:

Mr. Schwellenbach. Mr. President, on day before yesterday I discussed the situation upon which the amendment is based.

The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature. I should like to say that, so far as I am concerned, I cannot agree with the position taken by the Senator from Missis-

sippi [Mr. Harrison], indicating that there might be some danger about extending this measure to agriculture. So far as I am concerned, I think there would be a regulation of hours and wages for all workers in the country; but the bill does not attempt to do that. The bill attempts to exempt agricultural workers. The situation in which I am principally interested is a situation involving the apple industry, and it is one in which, unless an exemption of this kind is made, there will be a discrimination against the small producer and in favor of the larger producer.

In other words, in a small apple operation of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples Therefore, it is necessary for such a farmer either to join other farmers in a cooperative or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

The purpose of this amendment is to give protection against that situation, and to

make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer.

Mr. Connally, Mr. President, will the

Senator yield?

Mr. Schwellenbach. I yield.

Mr. Connally. Of course, apple raisers are already exempt, are they not, under the term "agricultural workers"?

Mr. Schwellenbach. The amendment applies only to the packing, storing, and preparing of fresh fruits and vegetables.

Mr. Connally. The effect of the amendment is to exempt all employees of apple-

packing plants; it is not?

Mr. Schwellenbach. If they are engaged in the area of production, and so long as the apples are in their natural or raw state; yes, sir.

Mr. Copeland. Mr. President, did the Senator include in his amendment the word

"transportation"?

Mr. Schwellenbach. No; I did not include the word "transportation," because I do not believe that the transportation should be exempt; and I did not include "processing."

Mr. COPELAND. If the Senator will yield further for a moment, we have the same problem of the apple grower in my State. The small orchardist has seasonal work in the neighborhood in the picking, sorting; storage, and transportation of his apples. What I mean by "transportation,"—perhaps it is not the right use of the term—is the carriage of apples in the ripe season to the nearby markets, which in my case is New York City, and the work of those who drive the trucks and rush the apples from the cooperative or private storage house to the city; so does not the Senator think that word, too, should be used?

Mr. Schwellenbach. I will say to the Senator that as the amendment was originally prepared it had "transportation and marketing" in it. I have tried to limit the amendment to what I consider agricultural operations. Perhaps I am incorrect about it, but I do not feel that taking apples into market and selling them are parts of agricultural operations.

Mr. COPELAND. I live in Rockland County, N. Y., which is on the New Jersey line; and while the city of New York is the largest market for the apples raised in Rockland County, a great many apples are disposed of in Newark, New Jersey. The truck of the farmer carries the fruit to the market in Newark, which is a standard market where merchants go to get material, and the farmer stays there on the market stand until he can dispose of his truckload of ap-That is what I have in mind, because, of course, the transaction of getting rid of the produce may take late afternoon and all night. So as I originally introduced the amendment I had in it "transportation and marketing," and also the language the Senator used, which makes it clear that the

transaction is in the neighborhood; that it is not a great, big transaction involving a trip across the continent.

Have I made clear the thought I have in mind to the point where the Senator will accept the words "transportation and marketing" and make them an addition to his amendment?

Mr. Schwellenbach, I will say to the Senator from New York that I studied the amendment very carefully; and when we get beyond the point of preparing, packing, and storing—those operations which can be done on the farm by the large farmer as compared with the small one—I feel that we are going beyond the point of agricultural operations, and that the work really is not agricultural work.

Mr. Copeland. Mr. President, I disagree with the Senator, and do so, of course, in all good spirit; but, what I am saying is founded upon actual knowledge. farmer may be a very small farmer. may not produce more than one or two or three hundred barrels of apples, but in order to get them to market he has to put them on a truck-his own truck or a hired truck-and go the short distance, perhaps 20 miles, to the town where there is a central market where he may dispose of his product. That seems to me to be very obviously a part of the agricultural transaction, and yet I fear that I have not been able to convince the Senator from Washington to ·that effect.

Mr. Schweidenbach. Possibly I have convinced cayself the other way so thoroughly that the Senator's statement has not served to change my mind about the matter.

Mr. COPERAND. As a matter of fact is not the problem quite a different one in the great apple country of the West, where there are tremendous crops of apples which are taken in large quantities to the railroad station and shipped on to New York, where we buy and eat those apples; while on the other hand, the small farmer in my section, is not commercially engaged in the orchard. business, as they are in the West, or as they are on the great plantation of the junior Senator from Virginia [Mr. Byrd]? What the small farmer of my sections does is a part of his farming transaction. He takes his apples to market and gets rid of them; and I want to help him as much as I can.

Mr. McCarran. Is it not true, in keeping with what the Senator from New York has said, that in the State of the Senator who offered this amendment, the real truth is that the farmer takes the apples to a processing plant? I myself have seen this operation in the Senator's State, though the Senator knows about it much better than I do. The farmer takes the apple from the orchard to the processing plant. In other words, that is where the apple is really graded and boxed and prepared for shipment.

It seems to me that the Senator from New York is entirely correct in stating that up to the point where the apple is boxed and ready for shipment it is and/remains a product of the farm and is handled by the farmer. It seems to me the Senator is forgetting the real point of his amendment.

Mr. REYNOLDS. Mr. President, will the Senator from Washington yield to me?

Me Schwellenbach. I yield.

Mr Revnolds. A moment ago, in explaining his amendment, the Senator from Washington made reference to orchards covering 15 or 20 acres. Am I to assume that the Senator had in mind the protection of the small producer?

Mr. Schwellenbach. The production of the small producer as compared with the larger producer. In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill.

Mr. Reynolds. The small producer would hardly have more than 8 or 10 men employed in the gathering of a crop?

Mr. Schwellenbach. He takes his apples to a warehouse, however, and there are more than 8 or 10 employed in the warehouse.

Mr. Reynolds. In that instance, would not the Senator's amendment exclude from the provisions of the bill the larger cold-storage plants, where there are employed hundreds of men, and would not the

amendment of the Senator from Washington really exempt from the provisions of the law the larger refrigerating plants throughout the entire country?

Mr. Schwellenkach. I limit my amendment to employees who are working upon products from the immediate area, products in their raw or natural state, in their preparation, packing, and storing. I do not think that in these operations there would be any large or enormous plants such as the Senator has in mind.

Mr. Reynolds. I gathered from the terms of the amendment that it would actually remove from the provisions of the bill the larger cold-storage plants throughout the country. Of course, many of them we find in the cities of New York, Chicago, St. Louis, San Francisco, and Seattle.

Mr. Schwellenbach, Those are not in the immediate production area.

Mr. Reynolds, But they would be included.

Mr. Schwellenbach. No: they would not be included because they are not in the immediate production area.

Mr. Copeland. Mr. President, may I ask the Senator from North Carolina a question?

Mr. Schwellenbach. I yield to the Sen-stator from New York.

Mr. Copeland. Let me ask the Senator from North Carolina whether in all probability the point I have in mind is not provided for in the amendment he offered, which has just been adopted. His amendment, as I understand applies the bill to those who employ 10 or more persons. Is that correct?

Mr. REYNOLDS. That is correct.

Mr. Copeland. As the Senator understands his amendment, does it mean that to a fruit farm such as I have described, unless there are in excess of 10 persons, the act would not apply?

Mr. REYNOLDS, Under my amendment any figm, individual, association, or corporation employing 10 or less number of persons would not be subject to the provisions of the bill. That is why I made, inquiry a moment ago as to whether or not the small producers of apple would not be reached by it. What I am particularly interested in ascertaining as to the amendment is whether or not it will be of material benefit to the small producer. expect in a few moments to offer an amendeliminating \tobacco warehouses. There are 57 of them in North Carolina. and their work is sassonal. Eliminating them from the provisions of the proposed law would benefit the tobacco farmers of my State. So I am assuming that the amendment offered by the Senator from Washington would actually be of benefit to the small fruit growers of his State. That is the intent, is it not?

Mr. Schwellenbach. That is the purpose of it.

Mr. Connally, Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territory? There is no limit. The condition is that they are packing plants, and if they are, they are exempt.

Mr. Schwellenbich. If a packing plant is working upon fresh fruits or vegetables, in their rawsor natural state, within the immediate production area, it would be

Mr. Connally. My understanding is that the largest apple packing plant in the world is located at Winchester, Va., right in the heart of a great apple-producing region? That would be exempt, would it not?

Mr. Schwellenbach. If the work done in that plant is as described in the amendment, it would be exempt.

Mr. Connally. Why should a man engaged in packing apples be exempt, and a man packing lemons or oranges or grape-fruit, not be exempt? What is there about apples that makes them entitled to exemption?

Mr. Schwellenbach. The purpose of the amendment is not for protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer

pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a parity with the larger producers, who can afford to maintain their own warehouses and their own washing machines and their own equipment.

Mr. Barkley, Mr. President, will the Senator from Washington yield?

Mr. SCHWELLENBACH, I vield.

Mr. Barkley. I suppose that any establishment dealing with apples as they come from the orchard is dealing with them in their raw state.

Mr. Schwellenbach. That is correct.

Mr. Barkley. There are many things which may be made from apples—for instance, applesauce, which I presume is not included within the regulations of the bill. But if we provide for the exemption of plants which are dealing with apples as a raw material, we include practically all plants which deal with apples, because they deal with them only as raw materials. Is that true?

Mr. Schwellenbach. No; I think the Senator is incorrect in that suggestion. The exemption applies when they deal with them in their raw or natural state. If they start making eider out of them, or start making applesance out of them, then they are processing and not dealing with them in their raw or natural state.

0.

Mr. Barkley. They are dealing with the apple in its raw state?

Mr. Schwellenbach. Not after they put it through the first grinder. It then ceases to be in the raw or natural state.

Mr. Barkley, Somewhere between the apple and the cider this proposed law will take effect.

Mr. Schwellenbach. I do not think there would be any difficulty as to a construction of that kind, because once it gets to the point which the Senator from Kentucky describes, then it becomes processing, and there is no inclusion of processing in the amendment.

Mr. Black, Mr. President, will the Sen ato: yield to me?

Mr. Schwellenbach, I yields

Mr. Black, Would the amendment apply to a cannery?

· Mr. Schwellenbach. No.

Mr. Black. What would be the definition of the word "prepare"?

Mr. Schwellexbych, "Prepare in the natural or raw state" is washing.

Mr. Black. It is limited, as the Senator understands, to the fruit as it actually comes from the tree?

Mr. Schwellenbach, Yes.

Mr. Black. The Senator knows that the committee has tried to provide and is favorable to a complete exclusion of activities which are purely agricultural. We have tried to write the bill in such a way as to take care of that situation. What about

the "area"? What would be the definition of "area"? Would it not be possible to define it more clearly to get the effect?

Mr. Schweimenbach. I gave considered able thought to that. I do not believe it is possible, and that is something which the board, which has been accused of receiving too much power, would have to decide. It would have to provide a definition of "immediate production area." [Italies supplied.]

Mr. Black. The Senator believes that in order to obtain the effect of what the committee has tried to do in writing the bill, it is essential that this amendment be adopted insofar as this particular type of business is concerned?

Mr. Schwellerbach. I feel so, and it is for that reason that I am offering the amendment. (81 Cong. Rec., July 30, 1937, pp. 7876, 7877, 7878.)

At the s. ggestion of Senator Black that Senator Pepper be consulted regarding the proposed amendment, it was temporarily withdrawn.

Senator Reynolds proposed an amendment exempting from the provisions of the Act "tobacco warehouses, their employers or employees." (81 Cong. Rec., July 30, 1937, p. 7878.)

Setator Barkley suggested that the amendment should not be extended to warehouses, that are not seasonal * * * * * ::

There are some talenece warehouses to which the tobacco is delivered during the

tobacco season, but during almost the whole year the warehouse operators engage in the process of prizing and stripping and stemming. I do not think the Senator means to exempt warehouses of that sort that engage in more or less year-round activity. (81 Cong. Rec. July, 1937, pp. 7878–7879; for the complete debate on this amendment see, infra, pp. 100–119.)

The amendment was subsequently enlarged to include cotton compressors, cotton warehouses, cotton ginning and baling, and was subsequently rejected by a tie vote. (S1 Cong. Rec., July 30, 1937, p. 7887.)

Senator Overton urged that cotton ginning was a step in the process of getting the farmers' agricultural product to market and that since the cost of ginning was imposed directly upon the farmer the operation should be exempt as an agricultural activity. (81 Cong. Rec., July 30, 1937, p. 7880.)

Senator McGill proposed an amendment making the agricultural exemption applicable to practices ordinarily performed "on a farm" as well as by a farmer, and adding to that exemption the words "including delivery to market." The discussion on this amendment follows:

Mr. McGull. Mr. President, the purpose of the amendment is to broaden the definition of "employee" as applied to agriculture. I can readily see how some have construed the language of the bill to mean.

that one who operates a threshing machine outfit and employs a crew and is employed by a farmer to thrash his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included. It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I amforrect, I should like to have the amendment agreed to.

Mr. George, Is it the purpose of the amendment to exempt those who thresh grain?

Mr. McGill. Those who thresh grain, who harvest grain, and deliver it to market.

Mr. George. Would the amendment also apply to the harvesting of any other crop?

Mr. McGill. It would apply to any commodity produced on a farm.

Mr. George. Would it apply to peanut pickers who pick in the fields?

Mr. McGill. Yes.

Mr. George. And who move peanuts to the market.

Mr. McGull. Yes: that is my understanding.

Mr. George. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

Mr. Black. That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now centained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

Mr. George. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm integest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

Mr. Black. Unquestionably.

Mr. McGill. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes.

Mr. George. And so long as it is merely preparatory and necessarily preparatory to the marketing of the field erop. Is that true?

Mr. McGill. That is true; and the language would also include all labor performed in making delivery to market.

Mr. George, I thank the Senator.

Mr. Copeland. Of course, that would take care of my apple man, about whom I have been worrying, would it not? It would take care of the farmer who take his crop of apples to the market, would it not?

Mr. McGill. That is correct. (81 Cong. Rec., July 30, 1937, p. 7888.)

The amendment was adopted (81 Cong. Rec., July 30, 1937, p. 7888).

Senator McAdoo proposed an amendment, substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits. (81 Cong. Rec., July 31, 1937, p. 7927.)

The following discussion ensued:

Mr. McAtoo. Mr. President, under the pending bill agriculture is excluded, but the definition of agriculture in the bill is not sufficiently broad to include work so closely connected with farming as to be substantially a part of it, such as packing, storing, and preparing for market.

Further, it does not cover services which, in my State—California—where producer cooperatives flourish, are largely performed for the farmers by the cooperative associations of which the farmers are members. Among such groups in California may be mentioned the fruit growers exchange, the raisin growers, the prune growers and

others of a similar character. The practice in these cases is for the laborers to work for the association—that is, the cooperative—rather than for the individual farmer, and the association does be packing and preparing for market, which elsewhere is generally done by the farmer himself.

These agricultural commodities are highly perishable, and the work which must be done by the packing houses and on the farms varies greatly with temperature variations. Twenty-four hours in advance one cannot know whether the crop must be moved. So, to fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with: the workers available. The broadening of the definition as I have suggested is not only directly in line with the object of the bill but will also protect the farmers, who, in my State at least, and engaged in a method of marketing, packing, and handling their crops which may differ from the methods employed in other States.

Mr. Barkley. Mr. President, will the Senator yield?

Mr. McApoo. I yield:

Mr. Barkley, Regardless of the merits of the first part of the Senator's amendment, on which I do not wish to comment, the last part seems to me to make possible the interpretation that the exemption would apply to any product derived from agricultural products all through the proc-

ess of manufacture, no marter to what extent or degree.

Lappreciate what the Senator is trying to do; he wishes this proposed law to be inapplicable to the operations referred to by him. He seeks to strike out the lans guage in lines 13 and 14, and proposes to substitute therefor the words—

"Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing formarket, in the raw or natural state, any products derived from any of the above agricultural pursuits."

"Any products derived from any of the above agricultural pursuits" might mean the manufacture of shoes, which come, of course, from leather, which comes from hides, which come from cows. It might be regarded to follow up the manufacture of horse collars, which are made of leather and straw, which are agricultural products. I am wondering whether the Senator wishes his amendment to go that far?

Mr. McAdoo. I had not intended it to cover horse collars or shoes, I will admit.

Mr. Barkley. Horse collars are manufactured from products derived from agriculture, as the Senator knows, both as to the leather and the straw.

Mr. McApoo. Almost everything in the form of food and clothing is manufactured from products of the farm.

Mr. Barkley. Yes; but I do not think the Senator wants his amendment to follow these things from the farm through all the factories so as to exclude them from the operation of the bill because they are "derived from agricultural pursuits."

Mr. McGill. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word "farmer," the words "or on a farm," and also by inserting in line 14, after the word "operations," the words "including delivery to market." it being the purpose of those amendments to exclude from the bill all labor performed on a farm, whether by contract with the farmer or otherwise, and to exclude all labor connected with the delivery to market of commodities produced on a farm. Does not that cover what the Senator has in mind for his amendments?

Mr. McAdoo. I do not think it is sufficiently broad. I may say to the Senator from Kansas so much of the preparation of our crops in California is through farm cooperatives that the alterations which have been made in the amendment I think do not widen it as much as is needed. I think, perhaps, I can meet the objection raised by our distinguished leader by omitting in lines 5 and 6 of my proposed amendment the concluding part, namely, the words "products derived from any of the above agricultural pursuits."

Mr. Barkley. That is the language I was afraid of, and I think that the Senator's amendment would be improved by eliminating those words.

Mr. McApoq. I am willing to strike out that part of the amendment and to submit the amendment in that form.

Mr. HATCH. Mr. President, will the Senator rield for a question?

Mr. McAboo. I yield.

Mr. Hatch. Would the Senator be willing to add, in lien of the words which he now says he is willing to strike out, the language proposed by the Senator from Kansas [Mr. McGill] relating to delivery to market, say, the words "including delivery to market."?

Mr. McADOO. I have no objection to that.

Mr. HATCH. I believe, then, the Senator's amendment would cover everything included by the amendment of the Senator from Kansas.

Mr. McGill. Mr. President, will the Senator from California yield?

Mr. McAdoo. I yield.

Mr. McGill. In response to what the Senator from New Mexico has just said, I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday such as mentioning harvesting, packing, and operations of that

character. The amendment adopted yesterday was intended to include, and I think it does include, all kinds of labor performed on a farm and all kinds of labor in connection with delivering agricultural products to market. In my judgment, it includes more than does the amendment proposed by the Senator from California and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California, by virtue of the narrower terms caffied in it, will be rejected.

Mr. McAdoo. Mr. President, the amendment suggested by me is not intended to eliminate the amendment to which the Senator from Kansas referred.

Mr. McGill. But it strikes out, the amendment to which I refer.

Mr. McAdoo Has the Senator the amendment before him?

Mr. McGhl. It was adopted vesterday and is in the Record. The Senator's amendment, if agreed to, would strike out entirely the lines covering the amendment to which I refer.

Mr. Perper I ask the Senator from California if it would not meet his objection and at the same time preserve the liberal amendment inserted yesterday, which was offered by the Senator from Kansas [Mr. McGill], to let the amendment of the Senator from California come

after the amendment of the Senator from Kansas, so that the bill would provide:

"And including any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state."

(Mr. McAboo, I consider that of the intmost importance where a large part of the services are rendered through farm cooperatives, and for that reason, while I do not want to affect the amendment of the Senator from Kansas, nevertheless I think the suggestion of my friend from Florida, is worthy of consideration.

Mr. McGua. I appreciate the purpose of the Senator from California, but my judgment is that his amendment will operate simply as a limitation to the amendment I offered and will not broaden its scope.

Mr. Adams. The Senator from California has stricken from his amendment the clause "any products derived from any of the above agricultural pursuits," so that it merely applies to processing without saving whether it is an agricultural product or not. He has stricken out the definition of agricultural products.

Mr. Preter. The Senator from California has not stricken out anything, according to his later suggestion. He merely suggests that he will let the provision be added at the end of the amendment of the Senator from Kansas, so that it will take care of what he has in mind without interfering with the exemptions which other Senators desire to have incorporated in the bill.

Mr. McApoo. From a hasty examination of the amendment which the Senator from Kansas (Mr. McGill) has brought to my attention, I cannot see how my amendment, if inserted in the bill, would have the effect which has been suggested. But, on the other hand, my amendment takes care of a situation involving the use of cooperatives.

Mr. George. I suggest to the Senator from California that, in my opinion, the amendment offered by the Senator from Kansas (Mr. McGill) vesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered vesterday by the Senator from Kansas.

I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases

which I think the Senator himself has in mind.

Mr. McApoo. Then I shall ask that further consideration of my amendment be deferred for the moment. I should like now to offer a second amendment to the amendment of the committee. (81 Cong. Rec., July 31, 1937, pp. 7927, 7928, 7929.)

An amendment proposed by Senator Borali, reading as fellows:

And provided further, that the provisions of this paragraph (c) shall not apply to employees employed in a plant located in dairy-production areas in which milk, cream, or butterfat are received, processed, shipped, or manufactured if operated by a cooperative association as defined in the Farm Credit Act of 1933—

was adopted. (81 Cong. Rec., July 31, 1937, p. 7947.)

An amendment proposed by Senator Overton including the ginning and baling of cotton in the definition of agriculture was rejected. (81 Cong. Rec., July 31, 1937, pp. 7951-7952.)

An amendment proposed by Senator Reynolds exempting from the provisions of the act employers of five or fewer than five persons was rejected. (81 Cong. Rec., July 31, 1937, p. 7948.)

Mr. Schwellenbach's amendment relating to persons employed within the area of production in the preparation, etc., of fresh fruits and vegetables, was adopted. (\$1 Cong. Rec., July 31, 1937, p. 7949.)

The bill was passed by the Senate on July 31, 1937, by a vote of 54 to 28. (81 Cong. Rec., July 31, 1937, p. 7957.)

3. S. 2475, as reported by the House Committee on Labor, August 6, 1937 (Seventy-fifth Congress; fir\$ session—H. Report No. 1452)

S. 2475, as passed by the Senate, was referred to the House Committee on Labor. As reported on August 6, 1937, the bill contained the following provisions relating to agriculture.

Section 2 (a) (7) provided that the term "employee" shall not include any person employed in the taking of fish, sea foods, or sponges; or any person employed in agriculture. As used in this Act, the term "agriculture" includes farming in all its branches and among other things inchines the cultivation and tillage of the soil, dairyings forestry, horticulture, market-gardening, and the cultivation and growing of . fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in subdiv Non (g) of Section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and any practices performed by & farmer or on a farm as an incident to such farming operations, including delivery to market. Independent contractors and their

employees in transporting farm products from farm to market are not persons, employed in agriculture.

Section 2 (a) (10) defined oppressive child labor as meaning a condition of employment under which "any employee (as defined in the Act to exclude employees of agriculture) under the age of sixteen years, * * *

Section 2 (a) (20) provided that "the term 'person employed in agriculture" as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state.

Section 4 (c) (5) provided that the provisions of that subsection relating to the Board's power to declare maximum workweeks "shall not be applicable with respect to any person employed in connection with the ginning, compressing, and storing of cotton or with the processing of cottonseed, the canning or other packing or packaging of fish, sea foods, sponges, or picking, canning, or processing of fruits, or vegetables, or the processing of beets, cane, and maple into sugar and syrup, when the services of such person are of a seasonal nature: And provided further. That the provisions of this paragraph (c) shall not apply to employees employed in a plant located in dairy production areas in which milk, cream, or butterfat are received, processed,

shipped, or manufactured if operated by a cooperative association as defined in Section 15, as amended, of the Agricultural Marketing Act."

Section (c) (5) provided that "the provisions of this subsection shall not apply to employees engaged in processing or packing perishable agricultural products during the harvesting season";

Section 16 authorized the Board to make regulations including but not limited to regulations defining technical and trade terms used in the Bill.

The only changes proposed by the Committee were:

- (1) Striking "ordinarily" from the definition of agriculture, so that that definition included any practices performed by a farmer on a farm as an incident to farm operations, without qualifications.
- (2) Adding a provision to the definition of agriculture excluding "independent contractors and their employees engaged in transporting farm products from farm to market."
- (3) Substituting for the words "ginning and baling", in the exemption from the hours provision of the bill in Section 4 (c), the words "ginning, compressing and storing" and including in that exemption "the processing of cottonseed."
- (4) Striking from the exemption from the hours provision in Section 4 (c) the reference to the Farm Credit Act of 1933 and substituting a

reference to Section 15, as amended, of the Agricultural Marketing Act.

The report accompanying the bill contained only the following comment:

Air-transport employees subject to title II of the Railway Labor Act are also excluded from the definition of "employee" as are all persons employed in agriculture. "Agriculture" is defined to include, among other things, practices ordinarily performed by farmers or on a farm as an incident to farm operations. A committee amendment proposes to strike out the word "ordinarily" before "performed." A committee amendment proposes to make it clear that independent contractors and their employees engaged in transporting farm products from farm to market are not persons employed in agriculture.

The Rules Committee of the House refused to grant a rule permitting consideration of the bill, necessitating its abandonment during the First Session of the Seventy-fifth Congress.

On December 13, 1937, the Rules Committee was discharged from further consideration of the bill by petition of the membership of the Douse.

Mrs. Norton, chairman of the House Committee on Labor, offered an amendment in the nature of a substitute for the bill (82 Cong. Rec., December 15, 1937, p. 1572). The definition of agriculture in the proposed substitute was identical with the

definition in the bill as passed by the Senate with the amendments proposed by the House Committee on Labor. The amendment contained all the other provisions relating to agriculture in the bill as passed by the Senate and proposed to be amended except those appearing in Section 4 (k) of the Senate bill as reported to the House (82 Cong. Rec., December 15, 1937, p. 1581).

Mr. Griswold also offered an amendment in the nature of a substitute containing substantially the same conditions as to agriculture as Mrs. Norton's. The Griswold amendment was rejected (82 Cong. Rec., December 15, 1937, p. 1604).

A series of amendments offered by Mr. Bland, designed to exempt from both the wages and hours provision of the bill employees engaged in various processing of agricultural commodities, were rejected (82 Cong. Rec., December 17, 1937, pp. 1776, 1777).

Likewise rejected was a proposed amendment including in the definition of agriculture operators of sawmills and manufacturers of lumber products employing not more than 25 persons (82 Cong. Rec., December 17, 1937, p. 1777).

An amendment offered by Mr. Kerr adding to the definition of "person employed in agriculture" persons employed within the area of production and in the manufacture of packages or containers used in the shipment of fruit, fish, or vegetables was rejected (82 Cong. Rec., December 17, 1937, pp. 1777, 1778). An amendment offered by Mr. Barcon including in the definition of agriculture persons employed in connection with the selling of to-bacco in auction warehouses was rejected (82 Cong. Rec., December 17, 1937, p. 1783; for the complete history of this amendment and the House debate pertaining to it, see, infra, pp. 119-122).

Mr. Lea proposed an amendment substituting for the words "fresh fruits or vegetable" in the definition of persons employed in agriculture the words "fresh or dried fruits or vegetables, nuts or eggs" and inserting the word "dried" in the phrase "raw or natural state" (82 Cong. Rec., December 17, 1937, p. 1783).

A substitute amendment was offered by Mr. Lucas to Mr. Lea's amendment making the provisions of the definition applicable generally to "agricultural commodities" and adding after the expression "raw or natural state" the provision including persons employed by any cooperative association as defined in the Agricultural Marketing Act if the association is engaged in preparing; packing, or storing agricultural commodities in their raw or natural state.

Mr. Lucas explained his amendment in part as follows:

Mr. Lucas. In paragraph 7 of section 2 of this bill you will find a definition of "employees." Read along and in line 12 you will find the words "or any person employed in agriculture."

There is nothing further than that so far as the definition of people employed in a agriculture is concerned until you arrive' on page 8, subsection (20), where you have a definition of the term "persons employed in agriculture," which limits it to fresh fruits of vegetables, but you do not find in this bill at any other paragraph anything about who a person employed in agriculture is unless you refer back to section 2. This amendment merely provides that a "person employed in agriculture" shall include persons employed within the area of production engaged in preparing, a packing, or storing agricultural commodities in the raw or natural state.

It broadens the definition and will adequately protect the farmers of my section. It exempts agriculture in all its branches and work incidental thereto, including the necessary handling and preparing for market commodities when performed by the farmer or by a farmers' owned and controlled cooperative. It should be understood that it applies only to the employees in the are to be determined by the Administrator where the commodity is produced. [Italies supplied.]

Mrs. Norron. Mr. Chairman, I rise in opposition to this amendment. If this amendment is accepted it virtually kills the entire section, since it takes out of the bill-everybody who has anything to do with agriculture.

Mr. MAVERICK, Mr. Chairman, will the gentlewoman yield?

Mrs., Norrow, I yield.

Mr. MAVERICK. I want to say that in my district there are pecan pickers or shellers who work for 3 to 5 cents an hour! Think of it! If this amendment these on these people are apparently without any protection whatever, and this bill will do them no good. So this amendment ought to be rejected.

Mrs. Norton. The gentleman is exactly right. I have letters from a number of those workers, and if there is anything to help them, it is to kill this amendment.

Mr. Maverick. If there is anything to be done, it can be done in conference. The conference can iron out these points.

Mrs. Norton. Exactly. I sincerely hope this amendment will be voted down.

Mr. Lea. Mr. Chairman, will the gentlewoman yield?

Mrs. Norton. I yield.

Mr. Lea. I call attention to the fact that the amendment does not affect picking, to which the gentleman from Texas (Mr. Mayerick) refers. It has nothing to do with picking. It simply relates to the preparation of the farmer's product for the market after the fruit has been picked.

Mr. MAVERICK. When I say "pick" it. does not use an picking it off the tree. It means breaking it and taking the nut out of the shell. These people are industrial

workers, not agricultural. They should be protected by the minimum-wage law.

The amendment was adopted (82 Cong. Rec., December 17, 1937, pp. 1783, 1784).

An amendment, offered by Mr. Pace substituting for the words "and growing" in the definition of agriculture the explanation "cultivation, growing and harvesting," was adopted (82 Cong. Rec., December 17, 1937, p. 2320). The amendment was explained merely as perfecting the definition by making it clear that harvesting was to be an exempt operation (82 Cong. Rec., December 17, 1937, p. 1785).

An amendment offered by Mr. Whittington including in the definition of agriculture "any person employed in connection with the ginning of cotton" was rejected (82 Cong. Rec., December 17, 1937, pp. 1786, 1787).

On December 17, 1937, a motion to recommit to the Committee on Labor was adopted, and a subcommittee of the House Committee on Labor was appointed to revise S. 2475 on March 1, 1938. A confidencial subcommittee print dated April 7, 1938, contained the following definition of agriculture (Section 2 (a) (7)):

> As used in this Act, the term "agriculture" includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities,

the raising of livestock, bees, poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. term "person employed in agriculture" as used in this Act shall include persons employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but shall not include employees of transportation contractors engaged in transporting farm products from farms to market.

The Committee on Labor rejected the subcommittee amendment and adopted a substitute for the bill presented by Mrs. Norton. On April 21, 1938, another draft of S. 2475 was reported to the House as an amendment in the nature of a substitute for S. 2475 (75th Cor. ess, first session, H. R. Report No. 2182). As reported, the bill contained the following provisions relating to agriculture:

Section 3 (f) contained the following definition of agriculture: "Agriculture includes farming in all its branches and, among other things, includes the cultivation and tillage of the soil, dairying, the cultivation, growing, and harvesting of any agricultural or horticultural commodities,

the raising of livesteck, bees, foxes, or poultry, and any practices performed by a Tarmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

Section 3 (g) defined employee employed in agriculture as follows: "Employee employed in agriculture" includes individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw, natural, or dried state, but does not include employees of transportation of farm products from farm to market.

Section 11 provided that the provisions of Sections 4 and 5 relating respectively to minimum wages and maximum hours, shall not apply to any air transport employee subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the taking of fish, sea foods, or sponges; or (6) any employee employed in agriculture; (7) any employee to the extent that such employee is exempted by regulations or orders of the Secretary issued under section 12.

Section 11 (c) provided that the "provisions of section 10 shall not apply to any employee employed in agriculture."

The report accompanying the bill contained the

Agriculture is defined to include farming in all its branches, and among other things to include the cultivation and tillage of the soil, dairwing, the cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, foxes, or poultry, and any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation, for market, delivery to storage or to market or to carriers for transportation to market.

"Employee employed in agriculture" is defined to include individuals employed within the area of production engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horficultural commodities in their raw, natural, or dried state. It does not include employees of transportation contractors engaged in transportation of farm products from farm to market. The definitions of "agriculture" and "employee employed in agriculture" are important in connection with the exclusion of employees in agriculture from all the provisions of the committee amendment.

The Rules Committee was discharged from further consideration of the bill on May 23, 1938, and the bill was adopted in the House on May 24, 1938.

Congressman Biermann, on May 23, 1938, announced that he would propose an amendment designed to remove the hardship that the bill in its present form "imposes on farmers." He stated:

The Bill, as presently worded, imposes hardships on the farmers, which in no way serve the purpose of the Bill. In section 2 the purpose of the Bill is declared to be to remedy "substandard labor conditions." Nobody complains of substandard labor conditions in the creameries, cheese factories, and similar institutions in the farming areas. As Charles W. Holman, secretary of The National Cooperative Milk Producers' Federation, says:

"Persons employed in agricultural processing plants in country districts are well paid and are envied persons in their community. Farm labor and, indeed, many farmers themselves would be happy to change places with those persons, fortunate enough to be employed in creameries, cheese factories, and country milk plants."

Tomorrow I shall offer the following amendment, which I hope the committee will accept:

"Strike out subsection (g) of section 3 and insert in lieu thereof: '(g) "Employees engaged in agriculture" includes individuals employed within the area of production engaged in the handling, packing, storing, giming, compressing, processing, pasteurizing, drying, or otherwise preparing agricultural commodities for market."

Nearly every large farm organization in the United States has endorsed this amendment. I know of none that opposes it. It is a well-known fact that most of the cost—in most cases all of it—of running these farm factories is taken out of the amount the farmer receives for his product (83 Cong. Rec., May 23, 1938, pp. 7325, 7326).

On May 24, 1938, Congressman Biermann stated his amendment has been modified by omitting the term 'processing' and including within the definition of employees engaged in agriculture, 'individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and 'butter.'

The debate on the amendment followed:

Mr. Biermann. This bill is aimed at substandard labor conditions, and I submit that any Member of this House who is familiar with the kind of institution that this amendment I have offered is aimed at will agree with me when I say that substandard labor conditions do not exist in these institutions. In an amendment I inserted in the Record yesterday I included the word "processing." I call attention to the fact that in the pending amendment this word is stricken out. I struck it out for the reason that some Members thought that processing would include the making of cotton and wool into textiles, and rubber

things of that kind. The amendment I have offered includes only the first processing of things that come off the farm. The important point is that the farmer pays the bill for this processing. Those of us who come from dairy sections know that the cost of making butterfat into butter or milk into cheese is borne by the farmer. There is no contention about that, no argument. The Members from the South will agree that the man who raises the cotton pays for ginning the cotton.

When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases, the farmer gets just so much less; and our contention and the contention of the farm organizations is that this bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country.

Mr. Coffee of Nebraska. This amendment would not take care of those employed in the handling of these seasonal crops outside of the area of production, would it?

Mr. BIERMANN. No.

Mr. Coffee of Nebraska. In other words, the Orange amendment and the gentleman's amendment are not in conflict?

Mr. BIERMANN. No; they do not conflict.

Mr. Thompson of Illinois. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men?

Mr. Bremann. Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Towa that this amendment would apply to perhaps but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town.

Mr. Whittington. With respect to the question propounded by the gentleman from Illinois, may I remind the gentleman from Iowa that the word "packers" occurs in the present Bill, so there is no difference between the amendment proposed and the provisions of the Bill under consideration. As I understand the gentleman's amendment, it is merely a clarification of the definition of the award "employee" under the gentlema of the Act.

Mr. Biermann, And it is the kind-of clarification the farm organizations want. The question to be decided in voting one this amendment is whether or not the farms of the United States are joing to have their definition of "employee" as applied to agriculture or whether it is going to be written by people who have a city viewpoint. I do not find fault with the Committee on Labora but I think whereas they are the experts who have knowledge regarding the big factories in Jersey City. New York City, and some of the other large cities, by the same token we who come from

the farm areas are best qualified to say what terms should apply to labor in those areas. I may say that not a single employee in any one of these factories has made an objection to this, sofar as I know:

Mr. WHITTINGTON. It is simply to permit the farmer to get his material prepared

for market.

Mr. Biermann. I want to read a couple of sentences from a letter-I received this morning from Edward A. O'Neal, president of the Farm Bureau Federation, in which he sets out the desirability of writing into this Bill definitions such as proposed in my amendment. He states:

"We believe the bill should be clarified so as to assure the exemption of employees in such agriculture and horticulture indus-

tries in rural preas." .

That is all my amendment takes in. He states further as follows:

"Failure to exempt these operations when performed in rural areas where conditions are so greatly different from the situation in large industrial and urban centers, will result in increased costs of processing and handling these products which will be reflected back in lower prices paid to farmers."

Mr. Crawford Does the gentleman's amendment exempt manufacturers of sugar beets in the rural areas?

Mr. BIERMANN. That is something that the Secretary will have to determine.

Mr. Reiery. Does the gentleman's amendment cover a pea-canning set-up that

is situated away from the farm on which the peas are grown?

Mr. BIERMANN. In a little town ?

Mr. Remay. In a little fown; yes.

Mr. BIERMANN. But in the farm area?

Mr. Reilly, Yes.

Mr. BIERMANN. Yes; it does.

Mr. Wadsworth. Let us look for a moment at the business of canning in a country canning factory. There are many of them in my district. I live within a mile of one and within 4 miles of another, and not to expose unduly any secret or make a remark of any particular importance, I sell sweet corn and peas to both of them.

The canning season starts in western New York, for example, first with early green peas around the first week or 10 days of June. The canning of peas goes on until the middle of July or toward the end of July, with the later varieties winding up the season. Then there is an off season of 10 days or 2 weeks before sweet corn comes in. The sweet corn canning season lasts clear through August and nearly all of September. It is followed in turn by tomatoes, carrots, and beets and spinach.

Now, all during that period that factory has to work very irregular hours. Just like the farmer, it is the slave of the sun and the weather. If we have about 2 days of unduly hot weather the heat suddenly ripens the crop more rapidly than the canning factory or the farmers have calculated. The result is it has to be rushed into the factory with all possible speed in

order that it may be canned in proper condition. While that is being done, which generally is not over once or twice in 10 days, the people in the factory work overtime. They probably do not work overtime more than once in a week or 10 days and seldom more than 2 or 3 hours of overtime.

This is a recognized custom in the trade. No one ever complains against it. The labor conditions are excellent; the whole thing is seasonal, and it is largely extra money to the operatives who get several weeks work through the summer.

If that country eanning factory is not exempt from the provisions of this bill, then all of its wage-and-hour limitations will be placed upon it, as well as the overtime provision, and when you increase the cost of processing fresh vegetables, you must expect one of two results. First, the factory must raise its price to the consumer-and I happen to know that they run on an exceedingly narrow margin-or else reduce the price paid to the farmer, and that is always what is done. Whenever you increase arbitrarily the cost of processing these fresh vegetables the farmer gets less per ton for them. I have been through it myself.

Mr. GILCHRIST. The amendment provides that out in the open country, where the handling, packing, or storing of agricultural commodities is done, there shall be certain exemptions from the provisions of the bill. We should have such exemptions so as to apply them to our creameries and milk producers and cheese makers. Do not destroy these farm activities. There is no question of health involved in what is done out in the open country, because the conditions there are healthful. The tempo of work out there is slower than in cities.

. There is no question involved as to the necessity for this amendment in the cities. and I would like to be for the bill if I can be. I deny the insinuation the gentleman. from the city of Brooklyn made that we are trying to sabotage this bill. That gentleman has no interest in farms or farming: As was said by another, "There has not been a calf born in his district for 50 years?" It is not the purpose to sabotage the bill, but if we do support the bill, it will be because it does not destroy our industries. The old bill provided for the things contained in this amendment. Why the change? The present bill takes care of the packing of apples, peaches, and pears, but it does not provide for such things as the canning of corn, the canning of tomatoes, or any of the other industries that the little villages depend upon and must depend upon. You folks are going to deny them that right if you vote down this amendment. I know what is in the substituté amendment which has been talked about here. It is merely a red herring drawn across the train. The 10 weeks spoken of in the committee substitute will not do. It will not rescue us from the situation that you are putting on us. It does

not provide for the things that my colleague from Iowa has provided in his amendment.

Mr. Thompson of Illinois. The amendment offered by the gentleman from Iowa, as well as section (g) of the committee amendment, is, in my opinion, entirely too far-reaching. I have no objection to exempting some of the small processors who do home curing and home canning from the provisions of this measure; but may I call the Committee's attention to the fact that in a large number of the smaller cities of our country, especially in the Middle West, there are many so-called small packing houses and canning plants. They are not so small after all. They employ two, three, of four hundred men and women and process various agricultural products. They kill pork, beef, lamb, and send it to the market, as well as can soups, vegetables, and fruits.

The canning plants in these small country towns do not do such canning for home consumption. They do it under contract for some of the large distributors of the country. The distributors from the large cities send out labels, and the commodities are then labeled and sent into interstate commerce to be consumed in the larger cities, and centers of population.

I think all will agree with me that these small cafining plants and so-called small packing houses very frequently pay notoriously low wages and work their employees long hours during the season. If we are going to have constructive wage-and-hour legislation, we should protect the people in the small communities, the people in these one-industry towns and villages, who are obliged to work in these factories, there being no other employment available. I hope, therefore, the Committee will reject the amendment offered by the gentleman from Iowa.

Mr. Chairman, in this connection, and assuming that the committee will reject the Biermann amendment. I ask the chairman of the Committee on Labor, the gentle-wonderfrom New Jersey, what is meant by the committee language in section (g) "but not commercial processing?" That is not clear in my mind and I would like to have a better idea of the committee's interpretation of that language which is in parentheses.

Mrs. Norton. I may say to the gentleman it does not include making fertilizer or any of those commercially processed articles.

Mr. Thompson of Illinois. May I ask the gentlewoman this question: Where there is a small packing house or small canning plant engaged in packing or incanning, what do they do with the commodity? What do they do with the pork and beef they kill? What do they do with the vegetables they can? It must be for commercial consumption. They cannot eat it all themselves, and generally speaking, these plants are not cooperatives.

Mrs. Norton. I may say that at the proper time I intend to offer an amendment which I think will take care of the small packing industries (83 Cong. Rec., May 25, 1938, pp. 7401, 7402, 7403, 7405, 7406).

The Biermann amendment was adopted by a vote of 159 to 134 (83 Cong. Rec., May 25, 1938, pp. 7407, 7408).

4. Specific proposals to exempt tobacco warehouses during the Congressional debate on S. 2475

Senator Reynolds offered an amendment to exempt from the provisions of the Act "tobacco warehouses, their employers or employees." (81. Cong. Rec., July 30, 1937, p. 7878). The proposed amendment was rejected after the following debate:

Mr. Reynolds. Mr. President, I offer an amendment to the committee amendment, which I ask to have stated.

The Presiding Officer. The amendment to the amendment will be stated.

The Legislative Clerk. At the proper place in the amendment reported by the committee it is proposed to insert the following:

"The provisions of this act shall not apply to tobacco warehouses, their employers for employees."

Mr. REYNOLDS. Mr. President, North Carolina is the greatest producer of tobacco

of any State in the Union. Of course, it is unnecessary for me to state that its grade of tobacco is considered the best of any in the world. In North Carolina we have approximately 57 tobacco warehouses. They are in actual operation only a few months out of each year. As a matter of fact, the farmer himself is the one who eventually pays the cost of operation of the warehouses; and I think these warehouses should be excluded from the provisions of the bill.

Mr. La Follette. Mr. President, will the Senator yield?

Mr. REYNOLDS, I vield.

Mr. La Follette. Did I correctly understand the Senator to say that employment in tobacco warehouses is seasonal in character?

Mr. Reynolds. As a matter of fact, they are open for only several months of the year. I should say they are open not more than from 3 to 4 months of the year. In eastern North Carolina, of course, the market season is different than that in western North Carolina, where is grown the superior burley quality; but the warehouses as a rule are closed about 9 months of the year.

Mr. La Follette. So the persons who are employed in these warehouses have only 3 or 4 months' employment during the year?

Mr. Revnolds. That is all. Perhaps one or two men are employed throughout the year merely in the capacity of watchmen or repairmen; but, as a rule, the warehouses are in actual operation only during the selling season. In view of that fact I think they should be exempted from the provisions of the measure, because, after all, the small producer, the small farmer, is the one who actually pays the cost of operations.

Mr. La Follette. How many persons are usually employed in such a warehouse?

Mr. Reynolds. That, of course, depends entirely upon the size of the warehouse. In North Carolina we have the largest tobacco warehouses in the world, but we also have quite a number of the smaller warehouses. They employ anywhere from 10 to 40 or 50 persons, according to the squarefoot area and capacity of the warehouse. I recall that yesterday the Senate agreed to an amendment which gave protection to a number of agricultural enterprises. The amendment was offered by the Senator from Oregon [Mr. McNary]. I am of the opinion that warehouses which employ from 40 to 50 persons during the time they operate should be excluded from the provisions of the bill.

Mr. LaFollette. If the employment is absolutely seasonal in character—

Mr. Reynolds, Yes; it is seasonal in character.

Mr. LaFollette. While I do not believe the bill should be emasculated by a long series of exemptions, yet, if there is to be an exemption for seasonal work in relation to fruits and vegetables, I cannot see that we are in a very good position to resist an amendment which is designed exclusively to provide an exception for a purely seasonal occupation in connection with the harvesting and marketing of tobacco.

Mr. Barkeet, Mr. President, will the Senator yield?

Mr. Reynous. I yield by the Senator from Kentucky; and in yielding I wish to say that I have high hope that the Senator from Kentucky will be favorable to this amendment, because there are many to-bacco warehouses in Kentucky which are in the same position as those in North Carolina.

Mr. Barkley. With respect to this amendment, I wish to say in a preliminary sense that I think the only rivalry existing between the States of North Carolina and Kentucky is in the production of tobasco. I think North Carolina produces more tobacco, but Kentucky produces better tobacco, so that we average up pretty well in the matter of tobacco.

Mr. Reynolds, Mr. President, I dislike to disagree with the Senator from Kentucky in that respect, but I must.

Mr. Barkley. With respect to this amendment, it is true that in the entire tobacco region—North Carolina, Tennessee, Virginia, Kentucky, and every other State where tobacco is produced—many warehouses which are devoted only to the receipt of tobacco brought in by the farmers during what they call the tobacco season—

which varies in different sections of the country, as the extent of the season also varies—operate only for a period of 3 or 4 months. Some of these warehouses are cooperative, and are owned by the farmers themselves. The farmers deliver their tobacco to the warehouses, and the tobacco is received by the organization of which the warehouses are part for resale to the private tobacco market, largely dominated by some very large tobacco interests that have their situs in the Senator's State and elsewhere.

There are certain tobaccorehouses, however, that are not seasonal. I am afraid the language of the Senator's amendment would include them all. There are some tobacco warehouses to which the tobacco is delivered during the tobacco season, but during almost the whole year the warehouse operators engage in the process of prizing and stripping and stemming. I do not think the Senator means to exempt warehouses of that sort that engage in more or less year-round activity.

Mr. Reynolds. No; that is not my intent, and I shall be very happy indeed to accept the suggestion of the Senator from Kentucky and provide whatever phraseology is necessary to be added to the amendment itself so that it will bring about the exemption of only those warehouses which are, as it might be said, engaged in seasonal work.

Mr. Barkley. I suggest to the Senator that at the end of his amendment there be

added the words "where the employment is seasonal in character."

Mr. Reynolds. I shall be very glad to accept those words as part of my amendment, Mr. President.

Mr. Smith. Mr. President, is there not a clear definition of the functions of these warehouses in the names they bear? The Senator referred to a place where tobacco is prepared after it goes through the warehouse. Such places are called stemmeries; are they not?

Mr. REYNOLDS. Yes.

Mr. Barkley. That work is not altogether done in stemmeries. In some States a considerable part of the work goes on in the warehouses, and the buildings are referred to generally by the public as warehouses.

I ask the Senator from North Carolina if he will accept the language I have suggested?

Mr. Reynolds. I accept the language suggested by the Senator from Kentucky as part of my amendment.

Mr. Barkley. This situation applies to other States, as well as to the State of North Carolina.

Mr. Glass. Mr. President, we have to-bacco warehouses in Virginia, and I have never known one that has been engaged in the work of stripping and preparation of tobacco. That is done in the tobacco factories.

Mr. Barkley. Virginia produces a different type of tobacco from that produced in my State. In my State there are many of these establishments which are known as warehouses, and are referred to by the public as warehouses, in which the receipt of the tobacco is seasonal, but they continue the operation of prizing and preparation during a considerable part of the year.

The Presidence Officer. Is the Chair to understand that the Senator from North Carolina has accepted the modification of his amendment proposed by the Senator from Kentucky?

Mr. Reynolds. Yes; I accept that modification.

Mr. OVERTON, Mr. President, will the Senator from North Carolina yield?

Mr. REYNOLDS. I yield.

Mr. Overton. I desire to ask the Senator, a question. I did not follow his amendment very closely. I think some modification has been made of his amendment. I wish to ask him whether cotton compresses and cotton warehouses are included in the amendment.

Mr. Reynolds. The intent of the amendment which I offered is merely to exclude tobacco warehouses that are engaged in what may be called a seasonal work, from 2 to 3 months in the year; and I accept as part of my amendment language suggested by the Senator from Kentucky [Mr. Barkley] to make that intent more clear.

Mr. Overrox. Is there any difference in the duration of operation between a cotton warehouse and a tobacco warehouse?

Mr. Reynolds, I made mention only of

tobacco warehouses.

Mr. Overton. Are not cotton compresses and cotton warehouses engaged in as seasonal work as tobacco warehouses?

Mr. Reynolds, I suppose they are.

Mr. Overron. Would the Senator have any objection to including in his amendment cotton compresses and cotton warehouses?

Mr. Reynolds. No: I should have no objection, because in that instance also the little producer or farmer pays the bill as I understand. I should have no objection to including in my amendment the language suggested by the Senator from Louisiana; because the work in the cotton warehouse and cotton compresses is purely seasonal.

Mr. Overton. Mr. President, yesterday the Senator from Oregon [Mr. McNary] offered an amendment, which was agreed to by the Senate, which exempted cotton ginning from the workweek provisions of the bill. It does not exempt cotton ginning, however, from the wage provisions of the bill. As I understand the amendment of the Senator from North Carolina, it will exempt the warehousing of tobacco altogether from the provisions of the bill,

Mr. Reynolds. It is eliminated entirely from the provisions of the bill.

Mr. Overton. I think the Senator from North Carolina will agree with me—at least I hope he will—that his amendment, should include cotton ginning and baling, compressing and warehousing.

Mr. REYNOLDS. I shall be glad to include them in the provisions of my amendment.

Mr. Overton. Then Losk the clerk to report from the desk the amendment as modified.

The Presiding Officer. The Senator from Louisiana offers an amendment to the amendment of the Senator from North Carolina, and the clerk will report the amendment as modified.

The Legislative Clerk. The amendment, as modified, reads as follows:

"The provisions of this act shall not apply to tobacco warehouses, cotton compresses, cotton warehouses, cotton ginning and baling, their employers or employees, where the employment is seasonal in character."

The Presiding Officer. Does the Senator from North Carolina accept the amendment of the Senator from Louisiana?

Mr. Reynolds. I accept the amendment. The Presiding Officer. The question is on agreeing to the amendment of the Senator from North Carolina, as modified.

Mr. Black. Mr. President, I sincerely hope the amendment will be promptly voted down. In my judgment, there is no reason for continuing to make exemptions with reference to every kind of processing

. Mr. Connally, Mr. President

The Presiding Officer. Does the Senator from Alabama yield to the Senator from Texas?

Mr. BLACK. I yield. s

Mr. Connally. Is it not entirely possible that all exemptions will be eliminated in conference?

Mr. BLACK. That may be entirely possible. I do not know what the House will do.

Mr. Connally. The amendments which the Senate adopts will probably be deleted and eliminated in conference.

Mr. Barkley. Mr. President-

The Presidence Officer. Does the Senator from Alabama yield to the Senator from Kentucky?

Mr. BLACK, I yield,

Mr. Barkley. Of course, this being a Senate bill, if it were agreed to by the House, the bill would not even be in conference.

Mr. Black. Mr. President, I dislike very much to disagree with my good friend the Senator from North Carolina [Mr. Reynolds] and the senior Senator from Louisiana [Mr. Overton]. This bill, however, in its present form provides proper exemptions under a proper statement of facts relating to seasonal activities. It is my belief that, if by name we exempt particu-

lar businesses, the dictionary should be searched and the knowledge of each Senator should be searched with reference to the particular activities within his own State—and I may say that some of these businesses have relation to the section of the country from which I come—and simply put them all in at once.

Mr. Boxe. Mr. President, will the Senator yield?

The Presiding Officer, Does the Senator from Alabama yield to the Senator from Washington?

Mr. BLACK. I yield.

Mr. Boxe. It becomes evident that if many more amendments of the character suggested are to be offered, it is going not only to come to a point where we might as well adopt a blanket amendment removing from the bill all seasonal employment, for if we eliminate some seasonal activities it would seem only reasonable that we should exempt from the provisions of the bill seasonal industries in all forms. I do not think that was the desire of the Senate or of the author of the bill.

Mr. Overton. I understood the argument heretofore made by the very able and brilliant Senator from Alabama, who has charge of this bill, to be that it was the serious and bona-fide purpose and intent of the committee to exempt agriculture and those engaged in agriculture.

Therefore, under the provisions of the bill as it now stands, unquestionably purely agricultural operations would be exempted. Take the cotton farmer or planter who employs labor to plant his cotton. The labor so employed does not come under the provisions of this bill. The labor he employs. in picking cotton does not come under the provisions of the bill. The labor he employs in bauling his seed cofton to the gin does not come under the provisions of the bill: But the cotton farmer, when he has his cotton girmed, has to pay for the ginning. It is a burden that is imposed upon the farmer. It is as much a burden as is the picking of the cotton and the planting of the cotton and the hoeing of the cotton. It is a step in the process of getting his agricultural product to market, and the ginning of the cotton is just as essential to getting the cotton to market as is the picking of the cotton in the field. Why, then, should those who are engaged in the ginning of cotton, the cost of which operation is imposed directly upon the farmer. come under the provisions of this bill? Why should they not be regarded as others who are engaged in labor connected with agriculture and the marketing of agricultural products?

Mr. Reproles. Mr. President-

The Presiding Officer. Does the Senator from Alabama yield to the Senator from North Carolina?

Mr. Black. I yield.

Mr. Reynolds, I merely wish to make the observation that the Senator's argument would apply equally to tobacco farming.

Mr. Overrox. I have no doubt that that is absolutely correct; and the same argument applies to the compressing and to the baling of cotton. It seems to me, if the Senator in charge of the bill desires to exempt those engaged in agricultural pursuits, that he should accede to this amendment. I thank the Senator for yielding to me.

Mr. Black. Mr. President, if I may be permitted to speak, I was just about to say something about compresses. I do not understand that the compresses fit at all into the picture which has been drawn. I do not understand that it is necessary that compresses work long hours. They work throughout the year. They work when the cotton is brought to them. There is nothing perishable about the cotton. I can see no earthly reason why a cotton compress at a port should be exempted from the provisions of the bill.

Mr. Reynolds. Mr. President, will the Senator yield?

The Presiding Officer. Does the Senafrom Alabama yield to the Senator from North Carolina?

Mr. Black. I yield. .

Mr. Reynolds. I should like to ask the Senator if he would object to the adoption of an amendment exempting tobacco warehouses.

Mr. Black. I may say to the Senator I do not think that this is the proper way to provide exemptions for activities if they are entitled to be exempt. I think it is not right to take some types of business as to which the suggestion happens to be made here and ask for an amendment to exclude them, unless we are going to do away with the other provisions which give authority to the board to consider seasonal activities. Knowing the Senator's belief in the value of legislation of this kind, I know that he does not want a single exemption to be made legislatively or under the action of a board that would require long hours to be worked unnecessarily or wages to be paid that are below a standard of decency and the necessity of the person and which will fit the ease. Bearing that in mind, may I say to the Senator that we have provided in the bill a system which would really determine those facts on a basis of knowledge of the industry gained from the introduction of evidence. (81 Cong. Rec., July 30, 1937, pp. 7878-7880)

Mr. La Follette. Mr. President, when the pending bill was under consideration in the committee the members of the committee fully, realized that there were certain seasonal industries which of recessity would have to be excluded from the provisions of the bill. After careful study and after considering many of the amendments, some of them in identical form with those now being offered by individual Senators, the majority of the committee came to the conclusion that it was impossible to provide specific exemptions for industries which were seasonal in character, and therefore entitled to exemption, without emasculating the provisions of the bill, and without extending the exemptions to many related activities which obviously should come within the purview of the proposed legislation.

Therefore, the committee provided that the board should have power to grant exemptions and to make exceptions, for seasonal industries, after a proper showing had been made before the board that they were entitled to such exception or exemption.

The difficulty in attempting to write specific exemptions into the bill on the floor in the form of amendments is that in many instances the amendments will be so drawn that in their application they will grant exemptions to many operations to which, if the bill is to be enacted at all, it should apply. Take, for instance, the amendment which is now under construction. When the junior Senator from North Carolina offered the amendment I asked him whether employment in tobacco warehouses was seasonal in character, and he stated that it was.

However, the Senator from Kentucky pointed out the fact that many warehouses in his State employ their personnel upon a yearly basis; and it was upon his suggestion that the Senator from North Carolina accepted the language providing that to-bacco-warehouse employees shall be exempted from the provisions of this bill only in cases where their employment is of a seasonal character.

The senior Senator from Louisiana [Mr. Overton] suggested, and the Senator from North Carolina has accepted as part of his ameridment, the exemption of cotton gins and cotton-compressing establishments. Of course I am not as familiar with the operation of the compressing plants, if I may use that term, in connection with cotton as are the Senators from cotton-producing States. Nevertheless, I have visited cotton-compressing establishments; and they operated, according to my observation, exactly as a manufacturing plant would operate. (SI Cong. Rec., July 30, 1937, p. 7883)

The President Officer. The question is on agreeing to the amendment offered by the Senator from North Carolina, as modified, to the amendment reported by the committee in the nature of a substitute.

Mr. Walsy. Mr. President, I ask that the amendment be stated.

The Presiding Officer. The amendment to the amendment will be stated.

The CHIEF CLERK. At the proper point in the amendment reported by the committee it is proposed to insert the following:

"The provisions of this act shall not ap-

ply to tobacco warehouses, cotton compresses, cotton warehouses, cotton ginning and baling, their employers or employees, where the employment is seasonal in character."

Mr. Dieterich. Mr. President, in response to the suggestion of the Senator from Alabama [Mr. Black] that he is willing to have all the amendments voted on at the same time, I will say that I do not think that will be satisfactory to Members of the Senate who are in good faith offering amendments, and who have no intention whatever of weakening or emasculating the bill.

Mr. Black. The Senator evidently was not present when I discussed this question some moments ago. The idea is, as I said then, that if there is going to be a special exemption from the proposed law of one type of activity, it should include, as a matter of justice, every other similar type of activity in the Nation. Therefore, I think that they should all be placed in one amendment, if that is to be done. (81 Cong. Rec., July 30, 1937, p. 7884)

The Presiding Officer. The question is on agreeing to the amendment of the Senator from North Carolina.

Mr. Harrison. Mr. President, let us have the amendment reported from the desk.

The Presiding Officer. The amendment will be read again.

The Legislative Clerk. At the proper place in the bill it is proposed to insert the following:

"The provisions of this act shall not apply to tobacco warehouses, cotton compresses, cotton warehouses, cotton ginning and baling, their employers or employees, where the employment is seasonal in character."

Mr. Walsh, Mr. President, would the distinguished Senator from North Carolina be willing to incorporate in the amendment a provision to the effect that "if the board created under this act finds that the employment is seasonal", and so forth?

Mr. Reynolds. My understanding from the Senator's address is that he is in favor of the exemption of seasons' employment.

Mr. Walsh. I have said I am in favor of the exemption of seasonal employment, but I do not know whether or not the Senator's amendment relates strictly to seasonal employment. I do not want to have incorporated in the bill a provision classifying these occupations as seasonal unless they are seasonal.

Mr. Reynolds. They are seasonal.

Mr. Walsh. How many months a year do these employees work?

Mr. REYNOLDS. I should say 3 months would be the maximum amount of time.

Mr. Walsh. My objection is based on the viewpoint that all seasonal occupations ought to be exempted, especially from the

hours of labor provisions, but I have some doubt whether these particular occupations are seasonal. I will take the Senator's word. If he says that in no case do these employees work more than from 3 to 6 months a year, I will accept his judgment.

Mr. Reynolds, I am sure in most instances none of the workers are employed more than 3 months. Senators from those sections of the South involved know that these workers, are engaged actually not more than 3 months.

Mr. Walsh. Unfortunately, I am not from that section of the country. May I ask the Senator from Alabama [Mr. Black] whether he is in accord with the statement of the Senator from North Carolina?

Mr. Barkley, Mr. President, will the Senator yield?

Mr. REYNOLDS. I yield.

Mr. Barkley. The amendment of the Senator from North Carolina as originally offered simply exempted tobacco workers from the operation of the provisions of the bill. I called to his attention that there are in my State some tobacco workers, that, while most of them are seasonal, yet some operate for the greater part of the year because they do other things than simply to receive tobacco at a warehouse. At my suggestion the language was amended to provide that where the operation of the workers is not seasonal in character, the

exemption should not apply. (81 Cong., Rec., July 30, 1937, p. 7886)

The Presidence Officer. The question is on agreeing to the modified amendment offered by the Senator from North Carolina [Mr. Reynolds] to the amendment reported by the committee in the nature of a substitute.

The modified amendment of Mr. Reynolds was as follows:

"The provisions of this ast shall not apply to tobacco warehouses, cotton compresses, cotton warehouses, cotton ginning and baling, their employers or employees where the employment is seasonal in character."

Mr. Harrison, I call for the year and nays.

The roll call resulted-year 40, nays 40,

The Presiding Officer. On this question the yeas are 40, the nays are 40. The modified amendment to the committee amendment is, therefore, rejected. (81 Cong. Rec., July 30, 1937, p. 7887).

Representative Barden offered an amendment in the House of Representatives to include in the definition of agriculture those persons employed in connection with the selling of tobacco in auction warehouses. This amendment was rejected after the following discussion (82 Cong. Rec., December 17, 1937, p. 1783):

Mr. Barous, Mr. Chairman, I offer an amendment.

The Clerk read as follows:

"Amendment offered by Mr. BARDEN: On page 4, line 18, after the last comma in, line 18, insert and any person employed in connection with the selling of tobacco in auction warehouses."

Mr. Barden. Mr. Chairman, this amendment is designed to take care of the man who usually stays around the warehouse for the assistance of tobacco farmers who come in at all hours of the night, and day, too, as far as that is concerned, to unload their tobacco cargoes, a service heretofore rendered tobacco farmers.

Mr. Cooley. Mr. Chairman, will the gentleman yield?

Mr. BARDEN. Yes.

Mr. Cooley. Is it not a fact that the tobacco auction warehousemen employ this labor to assist the farmers in unloading their tobacco and placing it upon the market for the purpose of sale?

Mr. Barden. That is about the only use they have for them there.

Mr. Cooley. And is it not entirely seasonal employment?

Mr. Barden, Absolutely,

Mr. Cooley. And in the event an attempt is made to regulate the hours of these employees, I will ask the gentleman if it is not a fact that these warehousemen would not be able to find ready labor to take the place of these men to aid farmers in placing their abbacco on the market.

Mr. Barden. That is true. The work only lasts 3 or 4 months, at the most, in the fall of the year.

Mr. Fulles. Mr. Chairman, will the gentleman yield?

Mr. BARDEN. I vield.

Mr. Fuller. What is the difference in exempting people of this class and the sawmill men working out in the country, hauling their logs into town and unloading them, who want to have them taken care of at night or the man who is lauling his wheat into town or his cotton, and wants to have it taken care of at night?

Mr. Cooley. Mr. Chairman, will the gentleman yield to me to answer the gentleman from Arkansas?

Mr. Barden, Yes.

Mr. Cooley, These laborers are employed in the warehouse, on the floor, to assist farmers, and have to be there at all hours of the night. That does not mean that they actually work all night, because the farmers bring their tobacco in at all hours of the night and even at 2 or 3 o'clock in the morning sometimes, and until the farmers arrive with their trucks and wagons these employees sleep. When the farmer arrives the floor manager calls out for labor to aid the farmer, and then they wake up and unload the tobacco and then they go back to sleep.

The CHAIRMAN. The time of the gentleman from North Carolina has expired. The question is on agreeing to the amendment offered by the gentleman from North Carolina.

The question was taken; and on a division (demanded by Mr. Cooley) there were—ayes 8, noes 38.

So the amendment was rejected.

After defeat of Representative Barden's amendment to exempt from both the wage and hours provisions of the Act employees employed in tobacco auction warehouses, Representatives Barden and Cooley jointly proposed to exempt such employees from the overtime provisions only. This amendment was passed by the House after the following discussion (82 Cong. Rec., December 17, 1937, pp. 1804–1806):

Mr. Cooley. * * I would like very much to have inserted in line 14, after the comma, this language: "or any person employed in connection with the selling of tobacco in auction warehouses."

This is on page 16, line 14, after the comma, insert the language: "or any person employed in connection with the sale of tobacco in auction warehouses."

I realize when I mention the words "auction warehouse" a large majority of the Members of the House have no idea of what an auction warehouse is.

Mrs. Norton. Will the gentleman yield?

Mr. Cooley. I yield to the gentleweman from New Jersey.

Mrs. Norron. The effect of the gentleman's amendment is to exempt them from the hours provision?

Mr. Cooley. Yes. We were defeated when we attempted to exempt them from the wage provision.

In this connection, I may say that the entire tobacco crop of the State of Georgia is marketed by being sold in auction warehouses in the short space of 3 weeks. Can it be that the sponsors of this measure would undertake to regulate labor and wages in an industry that operates only 3 weeks but of 12 months? That is exactly what this bill will do.

In North Cayolina the entire crop is marketed in about 3 months and the warehouses have to stay open 24 hours of the day.

Mr. LANZETTA. Will the gentleman yield?
Mr. COOLEY. I yield to the gentleman from New York.

Mr. Lanzetta. Is it not possible to hire more men to carry on the work?

Mr. Cooley. No; because, in the first place, the labor is not available. In the second place, the tobacco is being brought into the market at every hour of the day and night.

Mr. Barnen, Mr. Chairman, I offer an amendment, which I send to the Clerk's desk.

The Clerk read as follows:

'Amendment' offered by Mr. Barden: Page 16, line 14, after the con na, insert 'or any person employed in connection with the sale of tobacco in auction warehouses.' (82 Cong. Rec., December 17, 1937, pp. 1804–1805.)

Mr. Barden. Mr. Chairman, I want to take about half a minute to say that this is the amendment the gentleman from North Carolina [Mr. Cooley] just discussed and which the committee chairman agreed to accept. As I understand it there is no objection to the amendment.

The CHAIRMAN.

All debate on this amendment has closed, under the rules of the House, there having been 5 minutes of debate for and 5 minutes debate against the proposition.

The question is on the amendment offered by the gentleman from North Carolina [Mr. Barden].

The question was taken; and on a division (demanded by Mr. Barden) there were—ayes 79, noes 37.

So the amendment was agreed to. (82
 Cong. Rec., December 17, 1937, p. 4806)

Shortly after it passed the amendment exemping employees of tobacco auction warehouses from

the overtime provisions of the Act, the House: voted to recommit the bill to the Committee on Labor (82 Cong. Rec., December 17, 1937, pp. 1834-1835). The bill reported back to the House after recommitment omitted this exemption (S; 2475, as reported in House of Representatives. Report No. 2182, 75th Cong., 3d sess., April 21, 1938).

On May 24, 1938, Representative Cooley once again proposed an exemption for employees of tobacco auction warehouses from both the wage and hours provisions. This amendment was rejected by the House after the following discussion (83 Cong. Rec., May 24, 1938, pp. 7408 7410)

> Mr. Cooley, Mr. Chairman, I offer the following amendment which I send to the desk.

"Amendment offered by Mr. Cooperation of the contract of the c · Page 50, line 20, after the word Tarmer · insert 'all persons employed in connection with the sale of leaf tobageo in agricun

Mr. Cooley. Mr. Chairman, when the last wage and hour bill was before the House. at the extraordinary session last fall, an amendment, similar to the amendment that I have just offered was accepted by the chairman of the Committee on Labor. 1: hope that the amendment may be accepted by the Labor Committee at the present time, and if not, that it may be adopted by:

the House. It is applicable only to those persons employed in auction warehouses in which leaf tobacco is soid. I cannot in the brief space of time at my disposal attempt to discuss in detail the operations of an auction warehouse but I call the attention of Members to the fact that auction warehouses are operated for me benefit of the farmers and in auction warehouses the farmer selfs his tobacco. In the State of Georgia the entire leaf-tobacco crop is marketed in the brief space of 3 weeks. North Carolina, Virginia, and in other sections of the country it takes longer, perhaps 3 or 4 months, but the point I wish to impress upon the House is that it is necessary for warehouses to remain open 24 hours each · day. The farmers bring their tobacco in at every hour of the night, and these employees are permitted to sleep and loaf on the job until a farmer arrives with his tobacco. The tobacco is then taken from the trick on wagon and placed on the auction warehouse floor. Riere is not sufficient labor available at all times to operate on regular shifts. of 8 hours each.

Mr. Sirovich. Mr. Chairman, will the the gentleman yield?

Mr. Cooley. I yield.

Mr. Sirovich. Who pays the wages of the man at the warehouse, the owner of the warehouse or the farmer who brings the to-bacco?

Mr. Cooley. The man who owns the warehouse pays the wages of the person as-

sisting the farmer in unloading his fobacco.

Mr. Shrovich. And the owner of the warehouse gets a commission on the sale of the tobacco.

Mr. Cooley. The farmer pays the warehouseman a commission for services, which includes the services of the auctioneer.

Mr. Shovich. Why should the ware-housemen be exempted?

"Mr. Coolly. The fact is that if these people are not made available by the ware-houseman the farme; must unload his own tobacco and perform his own labor. The warehousemen heretofore have "rendered that service for the farmer, and I am afraid that if they are put under this bill they will cease furnishing the service. Many of the farmers come in as carry as 2, 3, or 4 o clock in the morning, tired and exhausted; and if they do not have these laborers to help them unload their trucks or wagons, they will have to do it themselves. I hope the Members of the House will see the wisdom of putting this exemption in this bill.

Mr. Creat. Mr. Chairman, will the gentheman yield?

Mr. Cooley, I yield.

Mr. Creat. Technically, does the gentleman think that that is an operation that becomes a part of interstate commerce? Does that tobacco partake of the nature of interstate commerce until it has reached the floor and been sold? Is not the warehouseman before that time the agent of the seller? Mr. Cooley, I am inclined to think the gentleman is correct; but to remove all question of doubt, I think this exemption should be included in the bill.

Mr. CREAL. Mr. Chairman, will the gentleman yield further?

Mr. COOLEY, I yield.

Mr. Creat. The warehouseman charges 75 cents a hundred for handling this to-bacco, and part of the service he renders is to help the farmer unload. If through the operation of this bill that charge were increased, would not the discrimination be against the farmer just the same as it is in the case of freight rates?

Mr. Cooley. He would have to pay the bill or perform the labor himself. In all sincerity, I imcress upon the House the desirability of this amendment. I certainly hope it will be adopted as it was before. It is applicable only to a very few people. It will work a great hardship upon the farmers if they are forced to place their own tobacco on the floors of these auction warehouses.

[Here the gavel fell.]

Mr. Cochran. Mr. Chairman, I rise in

opposition to the amendment.

Mr. Chairman, the purpose of this legislation is not only to prove a minimum wage and maximum hours, but also to put more people to work; put more people to work is as important as wages and hours.

Mr. WHITE of Idaho. Mr. Chairman, will the gentleman yield at that point?

Mr. Cochran. No; I refuse to yield at the moment.

Mr. Chairman, the purpose amendment is to keep additional people from going to work. Here is a concrete example where if this legislation is put into effect, those who operate the tobacco warehouses will not be able to keep people on the job 24 hours a day, as the gentleman who offered the amendment admitted they do. He says they sleep there and that when the farmer comes he wakes them up and they help the farmer unload his trucks. What we want to do by this legislation & to require that when they work 24 hours a day they have three sets of employees, split their work up into three shifts of 8 hours each.

Mr. Cooley, Mr. Chairman, will the gentleman yield?

Mr. Cochran. I yield, because I referred to the gentleman's speech.

Mr. Cooley. I think the gentleman misunderstood me. I made the statement that the warehouses of necessity remained open 24 hours of the day and in many instances the warehousemen kept their employees there. They were not actually working through the 24 hours. If a farmer came in at 2 o'clock in the morning, he would have to call on the warehouseman to help him unload.

Mr. Cochran. I understood the gentleman perfectly. They keep their warehouses open 24 hours a day and only want to employ one set of men. The retailer keeps his place open, the manufacturer keeps his place open, and they will be required to meet the provisions of the bill. Why not your tobacco men? I repeat, what we want to do is to put more people to work in this country, just as much as we desire to have a minimum wage and maximum hours; that is what we are trying to do and propose to do. * * * (83 Cong. Rec., May 24, 1938, pp. 7408-7409)

Mrs. Norroy. Mr. Chairman, I move that all debate on this amendment do now close.

The motion was agreed to.

The Chairman. The question is on the amendment offered by the gentleman from North Carolina [Mr. Cooley].

The amendment was rejected. (83 Cong. Rec., May 24, 1938, p. 7410)

A final attempt to secure an exemption for tobacco auction warehouses (from the hours provisions only) was made by Representative Cooley shortly afterwards. This amendment was also rejected by the House after the following discussion (83 Cong. Rec., May 24, 1938, pp. 7428-7429):

Mr. Cooley, Mr. Chairman, I offer an amendment, which I send to the Clerk's desk.

.The Clerk read as follows:

"Amendment offered by Mr. Cooley; Page 53, line 21, at the end of section 5, insert *Provided*, however, That nothing in this section shall apply to persons employed in connection with the marketing of tobacco in auction warehouses."

Mr. Cooley. Mr. Chairman, this is another effort on my part to exempt the employees in auction warehouses from the hour provisions of this bill. The other amendment I offered a moment ago would have had the effect of exempting these employees from both the wage and hour provisions, but as I pointed out when I was addressing the House at that time, auction warehouses remain open 24 hours a day. This does not mean that these employees actually work 24 hours a day, but the warehouses remain open that long.

May I again impress on the House the fact that in Georgia the entire tobacco crop is marketed in 3 weeks. It is necessary to use a large number of employees to unload the tobacco for the farmers when it is brought into the tobacco warehouse. I cannot understand why this amendment should be objectionable to the Labor Committee.

ment is sufficiently broad to include these employees. I do not believe they are engaged in interstate commerce. I likewise believe they are handlers of agricultural commodities and would come under the provisions of that amendment. But by introducing this amendment I seek to clarify the situation so that we may very definitely know that these laborers who assist the farmers in unloading their tobacco shall

be exempted from the hour provisions of this act. I fear unless they are exempted definitely from the provisions that the warehousemen will cease to render this very valuable service to the tobacco farmers of our State.

Mr. CREAL. Will the gentleman yield?

Mr. Cooley, I yield to the gentleman

from Kentucky.

Mr. Creal. Is it not true that these men to which the gentleman refers are in most cases the sons of farmers, the tobacco raisers themselves, who live in the immediate community, and these men work there unloading that tobacco for their neighbor farmers?

Mr. Cooley. In many instances, I may say to the gentleman, the warehousemen employ farm boys to work in the warehouse and assist the farmers in placing their tobacco.

Mr. Patrick. Will the gentleman yield?
Mr. Cooley. I yield to the gentleman from Alabama.

Mr. PATRICK. The gentleman will agree with me that the purpose of this law is to distribute labor and work more evenly over the Nation?

Mr. Cooley. That is true.

Mr. Patrick. If the gentleman's amendment is accepted, will it not tend to defeat the very purposes of this bill?

Mr. Cooley. Absolutely not.

[Here the gavel fell.]

The CHAIRMAN. The question is on the amendment offered by the genthman from North Carolina [Mr. Cooley].

- The amendment was rejected.
- 5. Specific proposals to change the "area of, production" exemption during Congressional consideration of the Foir Labor Standards. Amendments of 1949

The bill reported by the House Committee on Education and Labor during consideration of the Fair Labor Standards Amendments of 1949 (H. R. 3190, reported in H. Rept. No. 267, 81st Cong., 1st sess., March 16, 1949), like the bill reported by the Senate Committee on Labor and Public Welfare (S. 653, as reported in Senate Report No. 640, 81st Cong., 1st sess., July 8, 1948), limited the "area of production" exemption (from both the wage and hours provisions of the Act) for employees engaged in the specified operations, to an overtime exemption only.

A proposal to transfer authority to define "area" of production" from the Secretary of Labor to the Secretary of Agriculture was proposed initially in the Lucas bill (H. R. 4272) but was later incorporated in H. R. 5856, the bill which was passed by the House (95 Cong. Rec., August 11, 1949, 11287). The bill passed by the House made no changes in the "area of production" exemption other than to incorporate the Lucas proposal transferring authority to define "area of production" from the Secretary of Labor to the Secretary of Agriculture.

While the Senate committee had recommended that the minimum wage portion of the "area of production" exemption be eliminated and that the exemption be restricted to an overtime exemption, it retracted this proposal in a committee amendment made on the floor of the Senate and proposed instead that no changes be made in the "area of production" exemption. During Senate discussion of the late, committee recommendation, the problems inherent in the statute and the House proposal to transfer authority to define the "area of production" were commented upon as follows:

Mr. Pepper. It is true, as the Senatorsays, that from the very beginning it has been most difficult for the wage and hour Administrator to define the area of production. It was originally intended that the area of production meant generally the part of a neighborhood in which production occurred; but when he undertook to define it as a legal matter, the Administrator ran into all sorts of difficulties, for example, as to what should be the size of the town, chat should be the distance a commodity would be transported, and so forth. What I am saying is that that has been the law since 1938. We thought-we could make some progress in extending the minimum wage to those workers. Frankly, we did not feel that they were getting what they were entitled to receive. However, as I started to say, at the committee meeting this morning the committee determined to retract from that provision in the pending bill the language which would have extended minimum wage coverage to those who are now within the area of production as defined by the Administrator in the handling and processing of the commodities which we have described.

Mr. Ellenber, Mr. President, will the Senator yield?

Mr. Perper. I vield.

Mr. Ellender. Does the Senator's proposal leave the law exactly as it is now written?

Mr. Pereir. It does. Whatever complaint there is on the part of the Senator from Mississippi relates to the law as it has been in effect since 1938. We are not changing it. What I now propose to do, Mr. President, is to offer a committee amendment which would eliminate the provision in the pending bill which would have made a change in the present law.

Mr. Ellender. Mr. President, will the Senator yield?

Mr. Pepper, I vield.

Mr. ELLENDER. Before doing that, will the Senator tell us whether the committee took into consideration the fact that the area of production should be defined by the Secretary of Agriculture or some other person, rather than by the Administrator?

Mr. Pepper. I thank the Senator for asking that question. The committee did take that into consideration. The matter

was also taken into consideration in the House of Representatives: There is a . letter in the Record to the chairman of the House Committee on Pabor and Public Welfare, from the Secretary of Agriculture, pointing out why he does not think it proper to vest in him that jurisdiction and that duty. There is also a letter to the same effect to the Senate committee, from the Secretary of Agriculture. I have a copy of the letter which was written to the chairman of the House Committee on Labor and Public Welfare. I do not have the letter which is coming to the Senate committee from the Secretary of Agriculture, which is substantially the same as this letter, except that I understand it contains an additional paragraph stating why he should not have this jurisdiction. The letter which I have reads as follows:

> United States Department of Agriculture, Washington, June 17, 1949.

Hon, JOHN LESINSKI,

Chairman, Committee on Education and Labor, House of Represent: atives.

Washington, D. C.

Dear Mr. Lesinski: I understand that it is proposed in a bill to amend the Fair Labor Standards Act (H. Ri 4272), which has been referred to the Committee on Education and Labor, that authority to define the term "area of production" as used in certain exemptions in that law re-

lating to the handling and processing of agricultural and horticultural commodities, be given to the Secretary of Agriculture. Because this Department would be directly affected by such a change in the law, and believes that there are certain difficulties inherent in such a proposal, I am taking the liberty of making known to you my views on the matter.

. I do not think I need to set forth in detail the difficulties of defining the term "area of production." This Department is aware of these difficulties; having been consulted by the Secretary of Labor prior to the issuance by the Administrator of the Wage and Hour Division of the present regulations under the Fair Labor Standards Act dealing with this matter. The subject has been one of fairly extensive discussion and correspondence between the Department of Labor and the Department of Agriculture. As a result of these discussions, I am in agreement with the Administrator that the "area of production" concept is inherently inequitable and that corrective action should be taken by Congress to eliminate these inequities in the interest of sound public policy. Your committee has acted wisely, in my judgment, in recommending legislation which explicitly specifies exempt activities instead of imposing upon the Administrator the responsibility for defining a concept which is very difficult to define satisfactorily.

If, however, the Congress should decide to retain the "area of production" concept in the Fair Labor Standards Act, I am convinced that the proposal to transfer the problem of defining the term to the Secretary of Agriculture would not alleviate the present difficulties. For these difficulties revolve around-inequities inherent in the very use of the term itself, since employees who are doing precisely the same things are exempt if they do them in the "area of production" but not exempt if they do them somewhere else. Furthermore, such action would create new uncertainties and problems since authority in the administration of the Fair Labor Standards Act with respect to such employees would be divided between two agencies. Conflicts of interpretation would be very likely to develop, such as experience has shown to be common when two agencies share jurisdiction over the same field. At the very least, such divided jurisdiction would add to the expenses of administration and would slow up the processes of advising individuals as to their status under the act. Accordingly, I would not favor any such transfer of authority with respect to the definition of "area of production" as is proposed in H. R. 4272.

Sincerely,

CHARLES F. BRANNAN,

Secretary.

Before I yield to the able Senator from Mississippi, let me say that the whole

theory upon which the Committee brings his bill to the Senate at the present time. stripped, as it is, almost to the very bone and relieved of almost all controversies, is in the hope that we may get this bill through this session of the Congress. There are many Senators and many citizens who want to extend coverage, who want to amend exemptions so that they will be less restrictive than at the present time. There are indoubtedly inequities in the area-ofproduction concept, and perhaps in other aspects of the law, but it is a complicated, long-drawn-out, and rather tedious process to perfect the law in a short-time. That is the reason why we who wanted to extend the coverage, reduce exemptions, and raise' the wage even higher; have been willing to subordinate our feeling about the matter to the sentiment of our colleagues, and that is why we bring to the Senate a bill unanimously supported by the subcommittee and by the full committee, with the Senators from Ohio and Missouri, in addition to the Senator from New Jersey, reserving the right with respect to one amountment to address themselves to it. I do not mean that Senators have foreclosed themselves, but the bill we bring here comes with the unanimous support of the subcommittee and of the full committee.

I want to say to the senior Senator from Mississippi that the area-of-production matter is a very difficult one. It may be that it should be somewhat clarified, and it

may be that in the next session of the Congress we may go into the whole question of clarifying difficulties of that character. But we are very earnestly hopeful that we can get a sample bill through this session of the Congress.

Mr. Eastland. Mr. President, will the

Senator vield?

Mr. Pepper. I yield to the Senator from

Mississippi.

Mr. Eastland. Is that provision retained in the bill?

Mr. PEPPER. Yes:

Mr. Eastland. It was condemned by the Secretary of Agriculture in the letter which the Senator read.

Mr. Pepper. That is correct. It has been difficult of administration. It does contain in equities [sic.] affecting both sides, no doubt inequities to the employer as well as to the employee, and it is no doubt a subject which should receive consideration by the Congress.

Mr. STEXNS. Mr. President, will the Senator yield?

Mr. Pepper. I yield.

Mr. Stennis. In view of the difficulties which the Senator has himself pointed out, and which have also been pointed out by the Secretary of Agriculture, what is the argument in favor of retaining any reference to the area of production? On what is it based?

Mr. Pepper. It is based on this: At the present time there is a complete exemption

in the processing of agricultural products in the area of production because it was generally considered that that is the neighborhood of the farm, as it were, a sort of a community institution. If we did not have the area of production and did not in some other way affect the matter, there would be, perhaps a large commercial enterprise a hundreds of miles away which might not be subject to any part of the Fair Lahor Standards Act, or, to turn it around the other way, there might be an enterprise a few hundred yards from where the farmer grew his commodity, and it might be subject to it.

Mr. Eastland, Mr. President, will the Senator yield?

Mr. Pepper, Will the Senafor permit me to finish? It has always been felt by the advocates of this legislation that everyone who processes an agricultural comprodity, no matter how large a processor he may be or how much of a commercial enterprise it may be, should be subject to the provisions of the law.

Let us consider the Campbell Soup Co., in Camden, N. J., having 10,000 employees. It is hard to understand why the Campbell Soup Co. should have an exemption from the missimum-wage law and the maximum-hour law when it is a big commercial manufacturing institution. On the other hand, if there were a gin somewhere in a community where cotton was grown, and it was more or less of a community enterprise, it

was felt that it should not be subject to the Fair Labor Standards Act.

Mr. Eastland, Mr. President, will the Senator yield?

Mr. Pepper. I yield to the senior Senator from Mississippi.

Mr. EASTLAND. As a matter of fact, today, are not such gins, in a locality where cotton is grown within a few hundred yards of the gin, subject to the law?

Mr. Pepper. I believe the size of the town in which the gin is located is one of the But of course that is an administrative regulation, due, no doubt, to the fact that it is generally assumed that not very much cotton is grown right around a large city. It is generally supposed that the area of production is out in the country, in rural sections, that the community institutions are serving them, and that they ought not to be considered as industrial operations. I believe, as the Secretary of Agriculture says, that there are inequities both ways. On the other hand, we may deny the workers the right to get a minimum wage and overtime pay in the Campbell Soup Co., althought [sic.] it is a 10,000s employee institution.

Mr. Stexxis, Mr. President, will the Senator from Florida vield?

Mr. Pepper, T yield to the junior Senator from Mississippi.

Mr. Stennis. Does the committee make any recommendation with respect to coping with this problem?

Mr. Pereer. The committee has not done so, except that it was our general idea that we might at the next session of the Congress take up the question of coverage and go more thoroughly into it. I can say as a member of the committee and a member of the subcommittee—and I am chairman of the subcommittee handling the subject now before the Senate—that we shall be very glad to consider anything the able Senators from Mississippi and other Senators may wish to submit on that subject.

Mr. Stennis. The Senator is dissatisfied, is he not, with the present situation, but does not have any immediate remedy?

Mr. Perper. That is correct; we do not at the present time have an immediate remedy.

My attention has been called to the fact that the letter addressed to Elbert D. Thomas, chairman of the Committee on Labor and Public Welfare of the Senate, has now arrived, and I have it in my hand. I believe it is substantially identical with the letter to Hon, John Lesinski of the House Committee on Labor, with the exception of the paragraphs at the end of the letter, which read as follows:

forth above, I should also like to point out that the proposal is inconsistent with one of the basic principles defined by the Hoover Commission on the Organization of the Executive Branch of the Government, namely; That the agencies and functions of

the Government should be grouped according to major purposes. It would be inconsistent with the principles of sound administration for the Department of Agriculture to have functions under a labor statute, just as it would be inconsistent for the Department of Labor to have functions under statutes relating to agriculture.

Accordingly I do not favor any such transfer of authority with respect to the definition of "area of production" as is

proposed in H. R. 5856."

This letter is dated August 29, 1949, and is from the Secretary of Agriculture. I offer the letter for the Record:

The Presiding Officer (Mr. Thre in the chair). Is there objection?

There being no objection, the letter was ordered to printed in the Record, * * *

Mr. Eastland, Mr. President, will the Senator from Florida yield?

Mr. Pepper. I yield to the senior Senator . from Mississippi.

Mr. Eastland I understand that the Senator thinks small community enterprises, such as cotton gins, which gin cotton in the community where the cotton is grown, should be exempted from the provisions of the act?

Mr. Pepper. That has been the general theory upon which the act has proceeded. I do not care to commit myself unequivocally on what we might agree to in the future, but I have always felt that the

size of the institution, the number of employees, and perhaps the volume of business done, might well have something to do with the question. Generally speaking, a small community institution has been outside the scope of coverage. If we could work out some way by which we would exempt the small community institution, and extend coverage to those institutions which are larger in character and industrial in nature, I should be very much pleased.

Mr. Stennis. Mr. President, will the Senator yield?

Mr. PEPPER. I yield for a question.

Mr. Stennis. I should like to ask the Senator a question with respect to the "area of production" matter we have been discussing. The adoption of the amendment the Senator now offers, on the general subject of processing plants, would not preclude an amendment from the floor on the matter of area of production; would it?

Mr. Pepper. It would not. It is not intended that floor amendments should be preciuded. We are now in the period of committee amendments, and I am offering the amendment as a committee amendment.

Mr. Taft. Mr. President, I understand that if this amendment is adopted it will restore the complete exemption of cotton gins.

Mr. Pepper. Just as they were.

Mr. TAFT. And country elevators?

Mr. PEPPER. That is correct.

Mr. Eastland. May I ask the Senator from Ohio a question?

Mr. PEPPER. Let me say, first, that there are two amendments now offered that are primarily affected by the amendment I am presenting. One is the amendment offered. by the junior Senator from Mississippi and the Senators associated with him. Another is the amendment offered by the Senator from Maryland [Mr. O'Conor] which would do just exactly what the amendment I offer proposes, namely, restore the law to what it was in the 1938 act with respect to area of production. Then there was an amendment by the Senator from Iowa [Mr. Gillette] which I think was intended to restrict the language of the bill which the committee has presently presented to the Senate

Mr. Taft. How about the amendment of the Senator from Nebraska?

Mr. Pepper. The Senator from Nebraska. [Mr. Butler] presented an amendment with respect to grain elevators. I conferred with him this morning about the action of the committee, and I understand the Senator is satisfied with the committee amendment, so that meets his question. He did not like the language of Senate bill 653 with respect to grain elevators.

I now feel that with the exception of the matter suggested by the Senators from Mississippi, and the matter of the definition of "area of production" given by the Secretary of Agriculture, the committee takes care of the amendments I have described. So, Mr. President, I do not know of any opposition to the amendment proposed by the bill to the present law. We are simply keeping the law in its present form. (95 Cong. Rec., Aug. 29, 1949, pp. 12436–12438)

The bill passed by the Senate made no changes in the "area of production" exemption (95 Cong. Rec., August 31, 19 J. 12583). The Conference Report (H. Rept. No. 1453; 95 Cong. Rec. 14925-14928) agreed to by both houses on October 18, 1947 (95 Cong. Rec. 14868, 14925) adopted the Senate version and also left the "area of production" exemption unchanged. The Statement by the Managers on the Part of the House in regard to the "area of production" provisions was as follows:

"Area of production": The House bill amended Section 13 (a) (10) of the act by transferring the authority to define "area of production" from the Administrator to the Secretary of Agriculture. The exemption was renumbered Section 13 (a) (11). The Senate amendment made no change in existing law. The conference agreement follows the Senate amendment in this respect and leaves the present law unchanged, and retains the numbering of the present Section 13 (a) (10).

The Senate discussion of the Conference agreement on the "area of production" exemption is as follows:

Mr. FULBRIGHT, Let me ask one other question, if the Senator will yield: What did the conference committee do with regard to the exemption of cotton gins and warehouses and compresses, which amendment was offered by the Senator from Mississippi [Mr. Stennis], I believe, and was adopted by the Senate?

Mr. Pepper. On that matter, essentially, the Senate conferees receded at the insistence of the House conferees, and the Senate amendment was deleted by the conferees, leaving the law as it is today—in other words, as the Wage-Hour Administrator says, in the case of cotton gins exempting about 90 percent of the cotton gins which are in the area of production. In other words, the processing of agricultural commentation which occurs within the area of production is at the present time exempt from the minimum-wage and maximum-hours provisions of the law.

The matter of the area of production is a very difficult one. It has been difficult of administration. The first definition laid down by the Wage and Hour Administrator was eliminated by the courts. Definitions which were subsequently devised have not, themselves, been altogether satisfactory.

There has been a general desire, both by those who favor the extension of this law and by those who did not favor the law at all, to have the definition modified and improved. I think it is the consensus of opinion of the conferces that they hope the Wage and Hour Administrator will constantly endeavor to improve the definition of "area of production," and, especially in the case of cotton, that he will apply it as liberally as possible.

Mr. FULBRIGHT. In regard to this matter, did the conferees make any statement relative to what the Wage and Hour Administrator should do?

Mr. Pepper. What I have just stated was the general opinion. I do not recall any express statement to that effect; but it was the general opinion in the conference that that should be done.

Mr. FULBRIGHT. Did the conferees also leave out the amendment of the House of Representatives which provided that the Secretary of Agriculture should define the "area of production"?

Mr. Perrer. The House conferees receded from that provision, for it was felt by the entire conference, after consideration, that it would be better to have the administration of the "area of production" provision in the Wage and Hour Administration, where it has been, rather than to divide the authority in this field between the Wage and Hour Administration, under the Secretary of Agriculture. We were influenced in that decision by a letter communicated to

both the Senate and the House committees by the Secretary of Agriculture, saying that he did not think it would be approprie ate for him to have the jurisdiction, that he did not welcome it, and that he had collaborated with, and would continue to collaborate with, the Secretary of Labor in working out this matter.

Mr. FULBRIGHT. Does not the Senator. think it significant that both Houses took action designed to change the present method, and indicating that a change was desired by both Houses, but that they approached it from a different angle; one amendment showing dissatisfaction on the part of the House with the present arrangement, and the other-the Senate amendment-specifically, giving exemption to those in counties where cotton is produced. For example, in the largest cottonproducing county in the United States, namely, Mississippi County, Ark., which is the most prolific cotton-producing county among those of comparable area, the town of Blytheville is not exempt. As the Sena; tor from Florida knows, any warehouse in a town having a population of more than 2,500 persons is not exempt. So warehouses in that town are not exempt.

So the act which the court has not held invalid has not brought about an exemption in the case of that particular industry.

It seems to me now that the conferees have acted, something more definite should be said on the part of the managers for the Senate, so as to direct, so far as they can

do so, the Wage and Hour Administrator to do something in this field, since both Houses of Congress have evidenced dissatisfaction with what is being done.

As a matter of fact, this item just misses being subject to a point of order, because the two Houses approached it in a somewhat different way, and the amendments are not to the same section of the bill.

Mr. Pepper. I am glad the Senator has clearly used the word "miss" there, because it is a very clear miss.

Mr. Fulbright. Yes; it just misses.

Mr. Pepper. The House had done nothing with respect to the matter in which the Senate is now interested, namely, cotton gins and compresses, as regards an exemption. The Senate did adopt an arendment providing an exemption for those operations. The House had agreed to a general administrative provision to the effect that the Secretary of Agriculture, instead of the Secretary of Labor or the Wage-Hour Administrator, should administer the area of production; but there was no mention of area of production in the Senate amendment, as I recall. So the two amendments were not the same at all.

Mr. Fulbright. The Senator from Florida may not be acquainted with this matter; but an amendment similar to the one adopted in the House was prepared—and I joined in it; and the junior Senator from Mississippi was to offer it, and I was the cosponsor of it. After the bill came here,

an amendment was offered and adopted in the Senate, and we, thinking of course that the amendment would receive favorable attention by the conferees, did not press the other amendment. But the objective of both amendments is exactly the same. The House amendment was designed to achieve the same purpose, namely, to get a reasonable definition of "area of production," which would have some application to this industry. That was the whole reason for the amendment. I think the Senator will find in the legislative history that those interested in cotton were the ones who then supported the House amendment.

So the real objective of both amendments was the same; but the two amendments were offered as two different methods of achieving it.

Mr. Pepper. Mr. President, I am quite sympathetic with the Senator from Arkansas and with other Senators who share his view about the "area of production" definition and about having it gradually improved in the course of administration. I think all of us are sympathetic in that connection, as regards having that done. But obviously we shall have to struggle with that in the years ahead, and shall have to struggle with that in the years ahead, and shall have to struggle with the question of whether we shall allow the "area of production" provision at all, or whether it will be withdrawn totally, or whether the "area of production" will be exempt.

But the fact that there have been so few suits questioning the rules that have been adopted in recent years, as contrasted with the situation in former years, indicates that progress is being made. We hope they will centimue to improve the definition.

Mr. Fulbright. Mr. President, I am sorry the conferces did not accept the Servate amendment. The Senate adopted it, of course.

Mr. Perren. The Senate did adopt it; but when we got into conference, those interested in other agricultural commodities felt that those commodities were being discriminated against; and the House conferces would not agree to this item.

The Vice President. The question is on agreeing to the conference report.

The report was agreed to, (95 Cong. Rec., October 18, 1949, pp. 14869-14870.)

FEB 23 1958

No. 278

In the Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

22

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY, KING EDWARD TOBACCO COM-PANY OF FLORIDA, AND MAY TOBACCO COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX IN REPLY

SIMON E. SOBELOFF.

Solicitor General,

Department of Justice, Washington 25, D. 6

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INDEX

	Rage
1. Interpretative Bulletin No. 14, U.S. Department	
of Labor, issued August, 1939, par. 10; (35 WHM)	
	1
	2
2. Quotation from opinion of the Solicitor of Labor,	
35 WHM 752-753	. 3
3. Administrator's Release M-12, 35 WHM 63-64	. 5
4. Quotation from U. S. Department of Agriculture,	. 3
Farmers' Bulletin No. 523, Tobacco Curing	
(1947) pp. 9-10	. 8
5. Report and Recommendation of the Presiding Offi-	0
cer, dated June 9, 1954, "In the matter of the	
definition of the 'area of production' as used in	
Sections 7 (c) and 12 (a) (10)? (constituting	
terroris 4 (c) and 13 (a) (40) (unpublished	
but available in the official records of the De-	
partment of Labor) a	0

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 278

James P. Mitchell, Secretary of Labor, United States Department of Labor, petitioner

Joseph T. Budd, Jr., and Florence W. Budd, Co-Partners, Doing Business as J. T. Budd, Jr., and Company, King Edward Tobacco Company of Florida, and May Tobacco Company

QN WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX IN REPLY

The appendix to the brief filed by respondents Budd and King Edward quotes excerpts from certain publications of the Department of Labor, as well as a published statement of a former Solicitor of Labor, which are quoted out of their context. This Supplemental Appendix is filed to show the proper context of these excerpts. Also included in this Supplemental Appendix are: Item 4, which is a quotation from a Department

Respondents assertion that there is no market for eiger leaf tobacco before it has been bulked (br. of Budd and King Edward, p. 29); and Item 5, which is the full text of the Report and Recommendations of the Presiding Officer, dated June 9, 1954, "In the matter of the definition of the area of production" as used in Sections 7 (c) and 13 (a) (10)," to which reference is made in the briefs of both petitioner (p. 25) and of respondents Budd, and King Edward (pp. 77-78, n. 41).

1. Section 1 of Appendix C, page 102 of the brief of respondents Budd and King Edward, quotes only the bracketed portions of paragraph 10 of Interpretative Bulletin No. 14:

It should be noted with respect to all of these practices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. It makes no difference whether they are performed on or off the farm if performed by a farmer: The . line between practices which are meident. to or in conjunction with farming operations, and those which are not; is not susceptible of precise definition. The agricultural exemption, however, would seem to include only practices which constitute a. solandinate and established part of the forming operations. Factors, that would in lieste that the practices performed by a

farmer are thus subordinate would be, among other things, that most of the employees engaged in such practice are normally employed also in farming operations upon the farm, and that these practices occupy only a minor portion of the time of the farmer and such employees and do not constitute the farmer's principal business. [Emphasis added.]

2. Section 2 of Appendix C, page 106, of Respondents' brief quotes only the bracketed portions of the answer of the Solicitor of Labor to a question regarding application of the agriculture exemption to tobacco warehouses:

Answer (Solicitor of Labor): You ask : whether the handling of the broad leaf and shade grown tobaccos, including all of the operations in the warehouse, comes within the Section 13 (a) (6) exemption. This exemption may under proper circumstances. apply to the operations performed on the tobacco by the growers provided that these operations are "performed by a farmer oron a farm as an incident to or in conjunction with such farming operations." appears that the companies are engaged in the growing of tobacco. The operations to which you refer may under proper circumstances be incidental to or in conjunction with the farming operations performed by them or on their farms. You are correct in your assumption that in any weeks in

[The Section 13 (a) (6) exemption is not limited to the first drying of a commodity but may also apply to redrying. Nor is this exemption limited to "first processing" operations. Under proper circumstances it may apply to further processing of agricultural commodities if the tests set forth in paragraphs 10 and 11 of Interpretative Bulletin No. 14 are met.]

3. Section 2 of Appendix D, page 110, of Respondents brief, quotes only the bracketed portions of the Administrator's Release M-12:

The new definitions of the area of production issued by the Administrator of the Wage and Hour and Public Contracts Divisions of the U. S. Department of Labor, may affect the labor costs of employers in the tobacco industry, as their status with regard to taking exemptions from the minimum wage and overtime provisions of the Fair Labor Standards Act may be changed. The Divisions began entorcing the new definitions on March 1, 1947.

The editors of therefore believe that men in the tobacco industry will benefit from this official resume of the new definitions' terms, furnished by the Divisions. * * *

TWO AREA OF PRODUCTION EXEMPTIONS.

There are two types of exemptions which are dependent upon the area of production. One is an exemption from both the minimum wage and overtime requirements of the Act, and the other is an exemption from the overtime provisions only, for a 14 week period each calendar year during seasonal operations.

Both types of exemptions are concerned with operations on agricultural or horticultural commodities. For the purposes of these exemptions, agricultural or horticultural commodities are such commodities as MINIMUM WAGE AND OVERTIME EXEMPTION

[If your employees are engaged within the area of production in the handling, packing, drying or stripping of tobacco for market they are exempt from both the minimum wage and overtime provisions. The "for market" requirement applies to each of the specified operations. Thus, employers of a cigar manufacturer who are handling tobacco for use by chief employer in the manufacture of cigars are not exempt, because they are not handling tobacco "for market."

[To aid employers in judging whether their employees' activities are within these specific operations, the following interpretations are offered:

["Handling" includes those physical operations customarily performed in obtaining tobacco, transporting it to and receiving it at the establishment, weighing it, placing the tobacco in the establishment, and delivering it to warehouses or to transportation facilities.

["Packing" includes operations involved in placing tobacco in containers, and closing or fastening the containers. ["Drying" may be performed by natural methods or by exposure to heat from ovens, furnaces, etc.

["Stripping" includes the pulling of tobacco leaves from the stalk, tying the tobacco leaves into hands, grading, and

sorting.

The Divisions want you to understand that only employees who are actually engaged in these specified operations will be within the exemption. * * * Moreover, if in any workweek an employee is engaged both in exempt operations and operations other than those specified as exempt, he would not be within the exemption during that week.

LIMITED OVERTIME EXEMPTION

If your employees are not within the exemption from both the minimum wage and overtime provisions, they may qualify for the second type of area of production exemption. Under the latter, employees of an employer who is engaged in the first processing of tobacco within the area of production are exempt from the overtime provisions of the Act—but not from its minimum wage provisions—for not more than 14 workweeks in the aggregate in the calendar year during seasonal operations.

The "first processing" of tobacco means the making of the first change in the tobacco from the form in which it nornally comes from the farm. The stemming, or redrying, or fermenting of tobacco may be a first processing operation, depending on which of these operations is performed first. Thus where cigar tobacco is "green stemmed," the stemming would be the first processing operation and the subsequent fermenting would not be so included. However, where the tobacco is fermented before being stemmed, the fermenting would be the first processing and the stemming would not so qualify.

The application of this exemption is restricted to establishments where first processing operations are carried on, and covers those employees who are actually engaged in first processing operations and those workers whose occupations are a necessary incident to such activities and who work solely in those portions of the premises devoted by their employer to these activities.

During weeks when a plant is engaged exclusively in the first processing of to-bacco, all employees working in the plant are considered to be within this exemption, including office employees, watchmen, maintenance workers and warehousemen. [Emphasis added.]

4. Quotation from U. S. Department of Agriculture, Farmers' Bulletin No. 523, Tobacco Curing (1947), pp. 9-10:

[Cigar tobacco] leaves, as stripped from the stalk [and after curing], * * * are Before the leaf is ready for the manufacturer it must undergo a process of fermentation, commonly spoken of as "sweating." Carrying out this process successfully requires a thoroughly equipped plant, with facilities for controlling ventilation, temperature, and humidity. As a rule, therefore, the growers sell their leaf in the bundle to the packers, who make a business of carrying on the fermentation on a large scale. [Emphasis added.]

Nearly all shade-grown tobacce is cured in part with artificial heat. * * * Under favorable conditions curing will be completed in 4 to 6 weeks. The cured leaf is taken down and tied into hands, which are delivered to the packer in either of the ways described in the preceding section. (Quoted above.)

^{5.} Report and Recommendation of the Presiding Officer, dated June 9, 1954, "In the matter of the definition of the area of production" as used in Sections 7 (c) and 13 (a) (10)" (unpublished but available in the official vectorits of the Department of Labor).

BACKGROUND OF THE PROCEEDING

. The statute and regulations.—Sections 13 (a) (10) and 7 (c) of the Fair Labor, Standards Act require that the Administrator define "area of production." The former provides year-round exemption from both the minimum wage and overtime pay provisions for any individual employed within the area of production engaged in certain enumerated operations on agricultural or horticultural commodities or in making dairy products. The latter section provides, among other things, exemption during 14 workweeks from the overtime pay provisions alone for employees in a place of employment where their employer is engaged in the first processing within the area of production of agricultural or horticultural commodities, during seasonal operations.

The present definition of "area of production" is contained in Regulations, Part 536, and has been in effect since December 1946. It defines area of production in terms of two principal criteria—location in the open country or in a rural community (generally referred to as the "population" test), and the distances from which the raw materials are received (the "mileage" test). The distances vary depending upon the commodities involved. The definition was adopted after extensive studies, including conferences with interested representatives of labor

and industry, and detailed economic reports dealing with the commodities affected, and after six formal public hearings, all undertaken after the U. S. Supreme Court declared invalid a definition based in part on the number of employees.

Earlier definitions .- The first definition of "area of production," issued by the Administrator in October 1938 coincident with the effective date of the Act, relied on the criteria of number of employees and receipt of raw materials from farms in the immediate locality. Amendments effective in December 1938 and February 1939 added special provisions for dry edible beans and Puerto Rican leaf tobacco. Effective in April 1939, the Administrator added a provision applicable to perishable and seasonal fresh fruits. and vegetables which used as criteria location in the open country or in a rural community, and "immediate locality." Immediate locality was defined to exclude distances of more than 10 miles.

The definition was amended and revised in June 1939 to extend the population and distance criteria of the fresh fruit and vegetable definition to all agricultural or horticultural commodities. The seven-employee limitation (an alternative for the population test) was retained; the "immediate locality" phrase previously used was changed to "general vicinity."

By an amendment published in October 1940, applicable solely to perishable or seasonal fresh

fruits and vegetables the criteria for exemption were limited to the general vicinity and number of employee tests, and the number of employees raised from seven to ten. Effective April 1941, the regulations were amended to apply the fresh fruit and vegetable definition to all commodities other than 'dry edible beans' and "Puerto Rican leaf tobacco," In January 1942, the definition for Puerto Rican leaf tobacco was amended.

It should be noted that during the period when the definitions were being developed, there were several public hearings at which all interested parties were afforded an opportunity to be heard on all relevant factors which might be considered in promulgating a definition.

The "Holly Hill" decision.—In its decision in Addison v. Holly Hill Fruit Products, Inc. (322 U. S. 607, 1944), the U. S. Supreme Court held that "area of production" could not be defined validly in terms of number of employees. The court noted the Congressional intent to distinguish between rural communities and urban centers and indicated in the following language the general principles for drafting a new definition:

The textual meaning of 'area of production' is thus reinforced by its context: 'area' calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural com-

modities and more or less near their production. The phrase is the most apt'. designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country the bounds of these areas · could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and maximum hours.

In delimiting the area the Administrator may properly weigh and synthesize all such factors.

The Fair Labor Standards Amendments of 1949.—Following the adoption of the Fair Labor Standards Amendments of 1949, which, among other things, increased the statutory minimum wage requirement to 75 cents, a number of persons petitioned the Administrator to amend or modify the present definition. These petitions alleged that substantial economic discrimination exists between establishments which meet the requirements of the present definition and those which do not. The petitions also alleged that

changes had taken place in regard to the economic conditions and other related factors which provided the basis for the existing regulations. In response to these petitions the Administrator published notice on September 7, 1950, that he would receive and give consideration to specific proposals for changes in the definition.

H

THE PRESENT PROCEEDING

Among the responses received to the Administrator's notice, most requested that a public hearing be held. The Administrator thereupon (February 21, 1951) gave notice that a public hearing would be held. The notice of hearing announced that "interested persons will be heard with respect to Regulations, Part 536, defining 'area of production' as used in sections 7 (c) and 13 (a) (10) of the Act on the questions:

- "(1) Whether any changes or modifications are now required.
- "(2) What changes or modifications should be made if any are required."

The Administrator authorized the presiding officer to submit "a report of the proceedings together with his recommendations as to the action to be taken thereon."

¹ The notice also made available for examination and study all the proposals submitted in response to the notice of September 7, 1950. A brief summary of these proposals was prepared and made available to interested parties upon request. Exhibit No. 1.

The hearing was convened pursuant to that notice, before the undersigned, duly designated as presiding officer.

In order to make the record more usable, appearances were scheduled by groups, roughly, divided by industry. Representatives of both industry and labor in these groups appeared and testified on the following dates: fresh fruits and vegetables, April 2-3, 1951; dairy products, April 3, 1951; peanuts and tobacco, April 4, 1951; grain and dry edible beans, April 5, 1951; cotton, April 6, 1951; tung nuts and miscellaneous, April 9, 1951. All interested parties were given full opportunity to testify and to cross-examine witnesses. records of all previous hearings on the definitions of "area of production" were incorporated into the record of this proceeding by reference. Proposals for changes in the definition made in response to the Administrator's request of September 7, 1950, were also incorporated into the record as were the statements in lieu of personal appearance. The total record of the hearing thus includes the complete records of the hearings held in 1938-39, 1939-40 and 1944-45, as well as over 800 pages of verbatim transcript, 73 statements in lieu of personal appearance, 45 exhibits, and approximately 150 responses to the Administrator's request for proposals.2

² The verbatim transcript is hereafter referred to as "tr.," statements in lieu of personal appearance as "S. L.," and pro-

Although the widest possible notice was given, the number and nature of personal appearances at the hearing evidenced considerably less interest than, for example, in the hearings held in 1944-45. Notably absent were appearances by organizations representing large segments of the industries engaged in canning and packing perishable or seasonal fresh fruits and vegetables. Relatively little interest was evidenced also by the dairy industry, with a personal appearance entered only on behalf of one state cooperative association. The apparent lack of interest of these major industry groups is particularly remarkable in the light of the fact that approximately one-half of all the employees who might be affected by the definition are employed in operations performed on fresh fruits and vegetables and as many as an additional one-fourth of such employees are employed in making cheese, butter or other dairy products. Also notable was the absence of representation on behalf of the poultry, egg, and cigarette tobacco industry groups.

THE LEGAL ARGUMENTS

· Population and mileage criteria void.—Much of the testimony at the hearing was to the effect that

posals for changes in the definition made in response to the Administrator's request of September 7, 1950 as "prehearing proposals."

A complete list of those who appeared personally is set forth in Appendix I.

the Administrator was without legal authority to use either the population or mileage criterion of the present regulations in defining "area of preduction." This testimony included many references to the legislative history of section 13 (a) (10), to the Holly Hill decision of the U. S. Sume Court, and to decisions of other courts. Some of it was marked with the warning or prediction of the witness that if the Administrator did not delete these criteria, they would be stricken in litigation. Thus, one of the leading witnesses for the cotton industry, counsel for the . national, regional, and state cotton compress and cotton warehouse associations, testified that the principal reason for urging a change in the definition is a legal one—that the present definition is not valid—rather than because there are economic and competitive factors that cause hardship. Counsel for one of the peanut associations urged that under the Helly Hill decision the population of the town in which a plant is located is no more pertinent to a definition of area of production than is the number of employees. Counsel for the tung nut industry, who also appeared as counsel for one of the cotton ginners associations, argued that the population test is void."

^{*}See, for example, tr. pp. 199-203, 715-717. See also Exhibits 13, 41.

See, for example, tr: pp. 248, 317.

⁶ Tr. p. 637.

⁷ Tr. p. 317.

Tr. p. 781.

In promulgating the present definition, the Administrator determined, on the basis of the legislative history, the various court decisions, and the available comomic data, that "The best-available criteria for delimiting territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production, and for distinguishing between 'rural-agricultural' and 'urban-industrial' conditions in accordance with the intent of Congress were found to be: (1) the distances from which the enterprises obtained the commodities on which they performed the operations named in the statute; and (2) the nature of the community in which they were located, as indicated generally by a population test." / The Administrator's opinion that these criteria are valid under the statute and pertinent decisions of the courts is followed in this report. 10

⁹ Findings of the Administrator, Dec. 18, 1946, p. 2.

There can, of course, be no doubt that the validity of the criteria employed by the Administrator in defining "area of production" is a question which will ultimately be decided by the courts, where it is now being litigated. After the close of the hearing, the validity of both the mileage and population tests was sustained in Tobin v. Traders Compress Co., 199 F. 2d 8 (CA 10, 1952), cert. den. 344 U. S. 909 (1952). It is the position of the Administrator that the decision in this case represents a sound view, which the Administrator

1V

PROPOSALS FOR CHANGE

Complexity of the problem. The Administrator, in the annual reports to the Congress and in

will follow until and unless the Supreme Court decides to the contrary.

In the Tryders Compress case the court held:

While the number of employees of an establishment has been excluded from the choice of etonomic factors available to the Administrator, we think the distance from which enterprises obtain commodities on which they perform operations enumerated in the statute is distinctly relevant to the definition. That test was one of the basic criteria in the Addison case, and the court, impliedly at least, sanctioned its relevancy as a permissible economic factor * * *

Having in mind that the primary object of the defination is to attempt to arrive at an economic balance between yural and industrial labor conditions, and also having in mind that no formula has yet been devised or suggested for the satisfactory attainment of that objective, we cannot say that population of cities and towns is not a relevant economic factor in determining whether labor conditions are predominantly rural or industrial. This is especially so in view of the admonition that the Administrator, not the court, is charged with the duty of promulgating a definition to achieve the economic purposes of the exemption.

It is our conclusion that the Administrator's definitive regulation is based upon relevant economic factors that it does bear a reasonable relationship to the purposes of the exemption, and is therefore not arbitrary and capricious.

A different conclusion was reached in *Leakins* v. *Direkin*, 208 F. 2d 941 (CA 5, 1954), rehearing denied Feb. 10, 1954. That court held:

* * * we are of the opinion that as to the exclusion therefrom [exemption under section 7 (c) from the

appearances before Congressional committees, has pointed to the need for revision of the complicated system of exemptions available under the Act for agriculture and for the handling and processing of agricultural products," Sections 13 (a) (6) and 13 (a) (10) provide year-round exemption from both the minimum wage and overtime pay requirements; section 7 (c) provides either a 14-workweek or a year-round overtime exemption; and section 7 (b) (3) provides a partial relaxation of the overtime requirements for seasonal industries during 14 workweeks. The exemption under section 13 (a) (6) depends on the employee's employment in agriculture as defined in the Act. In section 13 (a) (10), the applicability of the exemption is conditioned upon the employee's engagement in specifically enumerated activities, some of them also frequently

In the Jenkins case the Fifth Circuit ruled that Jenkins was not satisfied to the "area of production" exemption in section 7 (c) of the Act. Although the court ruled that the population test of the exemption was invalid, it appears that it was not technically required to do so for decision. This ruling is effective only in the States over which that Court has appellate jurisdiction.

See, for example, 1948 Annual Report pp. 123-134.

overtime provisions of the law] of plants located in or within one mile of towns of 2,500 population or over, the present definition is invalid. * * * while there certainly are good economic arguments to be made against restricting the area within a twenty mile limit, they do not at all show that the distance fixed was arbitrary and without relation to "area of production" as the Congress used that term. * *

performed on a farm and, in that event, within 'agriculture' as defined in the Act. Under section 7 (c), exemption depends on the employees' engagement in a place of employment where their employer is engaged in named operations, some of them identical with activities enumerated in section 13 (a) (10). Under section 7 (b) (3), exemption is applicable to all employees in an industry found by the Administrator to be of a seasonal nature.

An example of the complexities involved can be seen in the application of these provisions to the packing of fresh fruits and vegetables. appropriate circumstances, such packing if performed on the farm is considered "agriculture" and the exemption under section 13 (a) (6) is applicable. If the section 13 (a) (b) exemption is not available, but the packing is performed within the "area of production," employees who are physically engaged in such packing for market (but not watchmen, clerical or maintenance employees) are exempt under section 13 (a) (10). In any event, exemption from the overtime provisions is available for 14 workweeks under section 7 (c). If the establishment is exclusively engaged in packing, watchmen, clerical and main tenance employees are also exempt under section 7 (c). If the employer's establishment is not exclusively engaged in packing, exemption for such employees is available when their activities are a necessary incident to the packing operations

and they work solely in those portions of the premises devoted by their employer to the packing operations. Without regard to the applicability of sections 13 (a) (6), 13 (a) (10) and 7 (c), an exemption from overtime pay requirements for work up to 12 hours in any workday or 56 hours in any workweek for not over 14 weeks in the aggregate in any calendar year is available under section 7 (b) (3) for employees of a fresh fruit or vegetable packer (including watchmen, clerical and maintenance employees) because fresh fruit or vegetable packing has been determined to be of a seasonal nature.

In the context of this complex structure of statutory provisions, it is understandable that several of the proposals and representations made at the hearing reflected confusion as to the purpose of the hearing and the authority of the presiding officer and the Administrator. Statements made by or submitted on behalf of severalsuch proponents revealed, for example, a misunderstanding of the applicability of the exemptions under sections 7 (c) and 13 (a) (10), apart from the definitions of "area of production;" and further, that they did not understand the relation between these so-called "area of production exemptions" and the exemptions under section 13 (a) (6) and those portions of section 7 (c) which do not refer to "area of production." Because of this misunderstanding, much of the testimony given by the witnesses for these proposals

could not be considered pertinent to the proceeding.

In both section 13 (a) (10) and that part of section 7 (c) which refers to "area of production," the statute is explicit as to the operations and other conditions under which exemption may become available. The only discretion given the Administrator arises from the duty to define "area of production." The Administrator is not authorized ty add or subtract from the operations. enumerated in those sections. Employees engaged in the operations enumerated in section 13 (a) (10), who meet the tests of the regulations, are exempt from the minimum wage and overtime pay provisions of the law without further action by the Administrator. Conversely, the Administrator has no authority to make exemption available under section 13 (a) (10) to employees other than those engaged in the enumerated operations.

That these limitations on the authority of the Administrator (and therefore necessarily on the authority of the presiding officer and the scope of this hearing) are not completely understood was manifest from some of the proposals made at the hearing. An example of the misunderstanding is the proposal of the one group of cigar tobacco processors who appeared at the hearing. It was stated on their behalf that in the "bulking" operation, overtime does not constitute a

¹² Tr. pp. 380-383,

^{376831 - 56 - 1}

the minimum wage exemption under section 13 (a) (10). The courts have reviewed and approved the Administrator's position that the "bulking" of cigar leaf tobacco is not among the operations enumerated in section 13 (a) (10). Under these circumstances, regardless of the definition of "area of production," the Administrator is without authority to consider employees engaged in bulking cigar tobacco exempt under section 13 (a) (10). It seems clear that the difficulties encountered by these employers are attributable to the statutory provisions rather than the definition of area of production.

Similar misunderstanding is apparent from the statement on behalf of an employer engaged in the ginning of cotton. That statement urged that the "area of production" definition be amended to exempt repairmen and off-season labor from wage and hour coverage.¹⁵ The same difficulty

¹⁸ Tr. pp. 373-374.

^{**}See, for example, Puerto Rico Tobacco Coop Assoc. v., McComb, 181 F. 2d 697 (CA 1, 1950). Several of the type 62 tobacco packers who appeared at the hearing urged the position taken at the hearing in litigation in the U. S. District Court, Northern District, Fla., entitled Durkin v. Budd, et al., The decision of that court, 114 F. Supp. 865, rejected their contention that the exemptions under sections 13 (a) (6) and 13 (a) (10) were applicable.

¹⁵ S. L. #31. See also, for example, the prehearing proposal submitted by the Agricultural Producers Labor Committee which would add to the operations for which exemption is available under section 13 (a) (19), those operations "directly connected with and essential to" the "functions" mentioned in the statute.

appears from the language of the definitions proposed by some of the segments of the fresh fruit and vegetable industry which were represented at the hearing. The language proposed would laye the effect of extending exemption under section 13 (a) (10) to employees engaged in other than the enumerated operations. In each of these instances the recommended action is beyond the authority of the Administrator and of the presiding officer.

In the course of the hearing it developed also that there was misunderstanding among some representatives of the cotton industry as to the effect of the definition of "area of production" under section 7 (c) on the overtime exemption available under that section for the ginning and compressing of cotton. Under section 7 (c) a. year-round exemption from the Act's overtime pay provisions is available for employees of an "employer engaged in the * * * ginning or compressing of cotton * * * in any place where he is so engaged." This provision is not limited by any reference to "area of production" and is therefore available without regard to the definition of "area of production." Finally, misunderstanding of the exemption for employees employed in agriculture under section 13 (a) (6). and the "area" of production exemption" appeared from the jestimony of representatives of

¹⁶ Tr. pp. 61, 104.

¹⁷ Tr. pp. 589-91.

grower-owned and cooperative vegetable packing houses."

THE NEED FOR CHANGE

The first question posed in the notice of hearing was whether there is a need for change or modification in the present definition. In developing the necessary information on the basis of which a recommendation on this question could be made, the major avenues of inquiry at the hearing were: (1) the extent to which employees engaged in the enumerated operations were being paid at least 75 cents an hour, (2) the extent to which such employees work overtime hours for which an overtime premium must be paid, and (3) the extent of the discriminatory effects.

Minimum waye.—The preponderance of the evidence at the hearing is to the effect that payment of the 75 cents statutory minimum wage was not then a problem." It is clear from the evidence that the primary concern of some of the

^{**} Tr. pp. 22-56,

¹⁹ See, for example, tr. pp. 42, 55, 117 and 231 (fresh fruits and vegetables); tr. pp. 272, 282 (dairy products); tr. p. 310 (peanuts); tr. pp. 426, 466, 471, 487, 587 (grain); and tr. pp. 682, 694 (cotton). There was also testimony indicating that in some few areas less than 75c an hour is actually paid. See, for example, tr. p. 691 and Exhibit 41 (cotton). It should be noted also that although testimony on behalf of the Maine dry edible bean packers was to the effect that at least 75c is now being paid, the employers sought authority to pay, and stated that the employees would accept, less than 75c. Testimony as to the discriminatory effects of the exemptions under section 13 (a) (10), for example, was also considered rele-

witnesses was the possibility that relief might be needed at some time in the future; rather than at the time of the hearing. These witnesses seemed concerned with the need to provide an escape valve so that if it becomes necessary at some time in the future, authority for paying less than 75 cents per hour will be available. With respect to the fresh fruit and vegetable industry, for example, there was testimony of the tenor, "We would do that (pay 80, 85 and 90 cents an hour) under these conditions anyhow, but if thingsturn * * * ," and "as far as the cents per hour is concerned, it would not have any effect on us now. What it might have in the future, I don't propose to predict." For the cotton industry it was testified that 75 cents an hour was being paid in most cases but that "before we get far from this hearing that minimum wage might be . raised." 22 Concerning the peanut industry, there was testimony that although 75 cents per hour was being paid, the industry was "not able to foresee the future" and that it was necessary when the

vant to the question of whether the requirement to pay the minimum wage constitutes a significant problem.

In the period between the dates of the hearing and the writing of this report (March 1954) the average wage level has risen substantially and it is reasonable to conclude that payment of the minimum wage is even less a problem at the present time,

²⁰ Tr. p. 56.

²¹ Tr. p. 117.

²² Tr. p. 684.

²³ Tr. p. 327.

time comes to be able to pay less "we should have the law such that it can be made available." ²⁴ Such testimony indicates at least that the requirement of paying the statutory minimum wage is not imposing any significant economic hardship in these industries and consequently would not support a finding that there is a present need for changing or amending the definition.

Overtime pay.-In determining whether need exists for changing the definition, consideration must also be given the effect of the requirement of paying additional overtime wages under section 7 of the Act. A significant factor in such consideration is the availability of exemption from the Act's overtime requirements under sections 7 (b) (3) and 7 (c). Thus, without regard to location within the area of production, year-round exemption from the overtime pay requirements is available under section 7 (c) for, the employees of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk or cream into dairy products, or in the ginning and compressing of cotton in any place of employment where he is so engaged. On the same basis, exemption from the overtime pay requirements is available during 14 workweeks in each calendar year for the employees of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables or in handling livestock. As

²⁴ Tr. p. 346.

the industries represented at the hearing now enjoy complete exemption from the overtime pay provisions for at least 14 workweeks in the calendar year, and many for the entire year; under section 7 (c). Section 7 (b) (3), the provisions of which have already been referred to, provides 14 workweeks of limited overtime exemption for many of the industries represented at the hearing. In some of these instances, e. g. first processing, canning and packing of fresh fruits and vegetables, the 14 workweeks of exemption under section 7 (b) (3) are in addition to the 14 workweeks of exemption inder section 7 (c). The section 8 (c) and 14 (c

²⁵ The storage of grain and cotton are the significant exceptions; others are the processing of tung nuts and of type 62 tobacco. Both grain and cotton storing have limited overtime exemptions as seasonal industries under section 7 (b) (3). There is pending before the Divisions a proceeding to determine whether the processing of tung nuts is an industry of a seasonal nature under section 7 (b) (3). The testimony as to the processing of type 62 tobacco is that overtime pay is not a problem. (See tr. pp. 373–374.)

^{.26} Sèe p. 20 above.

Examples of other industries which have been determined to be of a seasonal nature, as a result of which the industries may avail themselves of the exemption under section 7 (b) (3) are: Storing of raw cotton; receiving, ginning and baling cotton and handling baled cotton and cotton-seed; handling, preparing in their raw or natural state and storing perishable or seasonal fresh fruits or vegetables; storing of grain, including soybeans, flaxseed and buck-wheat; flat warehousing of grain; artificial drying of alfalfa hay and subsequent manufacture of meal; and warehousing of unshelled peannts.

These provisions for complete or partial exemption from the statutory overtime pay provisions appear to meet the needs of the industries that participated in the hearing and point to the conclusion that the overtime pay requirement is not imposing any significant economic hardship in these industries. Substantial support is lent this conclusion by the lack of evidence of hardship resulting from the requirement to pay overtime wages. As in the case of the testimony indicating that payment of the minimum wage was not then a problem, the record as a whole does not support a finding that there is a present need for changing or amending the definition because of hardship arising from the requirements for overtime pay.

Discriminatory effects.—Although the evidence reflected that in general there were no ill effects resulting from the statutory minimum wage and overtime pay requirements in cases in which the requirements of the area of production definition are not met, there was evidence tending to establish that economic hardship results or may result from the operation of the definition. The relatively small group of employers so affected find little solace in the fact that there are generally no ill effects. Their concern is with the fact that other establishments enjoy a competitive advantage. Thus, among the proposals received in re-

²⁵ That the discriminatory effects are not more widespread appears to be due in some measure to the steady upward movement of the general wage level since World War II.

sponse to the Administrator's original request, employers in the fresh fruit and vegetable industry in the Norfolk, Virginia, area complained of the advantage of other packers with whom they competed directly, because the competing packers were authorized to pay less than 75 cents an hour.29 Cotton ginners in New Mexico complained that employers whose plants were within the area of production as defined and those outside of the area of production competed for employees in the same labor market. 30 A fruit and vegetable canner complained that, with one exception, all of his competitors meet the requirements of the Unfortunately, many of those whose definition.31 responses to the Administrator's request for proposals indicated that competitive discrimination existed, did not appear at the hearing. 32 However, evidence of discrimination was offered at the hearing with respect to operations performed on fruits and vegetables, grain, cotton and tung nuts.33

²⁹ See prehearing proposals submitted by Growers Exchange and Battaglia Produce Shippers, both of Norfolk, Virginia.

³⁰ See prehearing proposal of New Mexico Ginners Association.

³¹ See prehearing proposal of Humboldt Canning Co.

⁵² For example, the proponents mentioned in footnotes 29 and 30. This was also true of Claybrooke Warehouse Gin Co. which stated that the competitive inequality made it impossible to stay in business. See prehearing proposal of that company.

^{**} Tr. pp. 142, 174, 184 (fresh fruits and vegetables), 425 (grain), 674-675, 703 (cotton), 756 (tung).

The evidence as a whole points up the obviously undesirable effect of the present definition-not all establishments have the same status under it; some are denied the exemption while others utilize it and therefore operate with reduced labor cost. Witness after witness urged that all employers in his industry should be subject to the same requirements; many indicated that definitions which had the effect of denying the exemption to all competing employers would be as acceptable as definitions making the exemption available to all such employers.34 A definition which would accomplish either of these results would of course eliminate the discrimination of. which the witnesses complained. Definitions which would deny exemption to all would in effect delete these sections from the Act; definitions which would make exemption available to all, would in effect delete the words "area of production" from the Act. In either event, such definitions would negate the Congressional intent to exempt some but not all of the employees employed in the enumerated operations. 35

Geographic area as a solution to discrimination.—Among the proposals frankly designed to exempt all or practically all establishments in a particular industry, by far the most frequently

³⁴ Tr. pp. 84, 87, 188, 218 (fresh fruits and vegetables), 489 (grain), 756 (tung).

³⁵ Addison v. Holly Hill Fruit Products Co. (322 U. S. 607).

advanced was the proposal to define "area of production" as the geographic area in which the commodity is grown. Prominent among the proposals of this type were those advanced by representatives of the cotton industry. In response to the Administrator's original request for proposals, the industry's representatives urged adoption of a county production criterion in lieu of both the mileage and population tests of the current definition. Under this prehearing proposal, employees would be considered exempt if engaged in the enumerated operations in an establishment: located in any county in which the 5-year average production of cotton is not less than 1,000 running bales. Several special provisions were also suggested for determining the status of employees in an establishment located near a county line. These proposals were, however, withdrawn at the hearing and in their place the proponents substituted the recommendation that for cotton, the area of production be defined as all counties in which any cotton is grown."

Whether a minimum production requirement is included or not, it is clear that a definition employing as a sole criterion the cotton production of the various counties has the very obvious advantages of readily available data and ease of

³⁶ Prehearing proposals, National Cotton Compress and *Cotton Warehouse Association, National Cotton Council, National Cotton Ginners Association, Georgia Cotton Ginners Association.

³⁷ Tr. pp. 608, 673-674, 710, 724;

comprehension, and would materially simplify a difficult problem of administration and enforcement. The Bureau of the Census regularly publishes statistics which show cotton production for each year. These statistics are obtained from reports based on records which ginners are required to keep, which show the county in which the cotton they gin is grown.

Desirable as are simplicity and ease of administration, these advantages are far outweighed by the fact that the proposals fail to accomplish the purpose of the definitions. It is clear from the record that under the proposals, all gins and compresses would be exempt as would practically all non-compress warehouses. 35 Moreover, seems clear that the fact of location in a county which produces cotton is not necessarily indicative of the nature of the local economy. It is not ur sual, for example, to find a highly urbanized and industrialized sector or pocket within a county producing cotton. Thus, large industrialized urban areas like Atlanta, Houston, and Memphis, are located in counties which meet the test of minimum production of 1,000 running bales of cotton each year 39 and, if the proposals

⁵⁸ Tr. pp. 613, 627; Prehearing proposal, National Cotton Compress and Cotton Warehouse Association.

²⁹ Cotton Production in the United States, U. S. Department of Commerce, Bureau of the Census, Agricultural Division.

were adopted, plants located in those cities would be within the area of production. The economic influences which operate in such cities are clearly urban-industrial rather than rural-agricultural.

That there is no necessity or predictable relationship between county production data and the location of cotton warehouses seems well established by the data submitted by the National Cotton Compress and Cotton Warehouse Association in support of its proposal. The data indicate, for example, that although Pinal County in Arizona produced more cotton than any other county. in the State, there is neither a compress facility nor a cotton warehouse in the county." Rather, all the county's warehousing and compressing is done in Phoenix, the largest city of the State. Since Phoenix is itself located in a county which produces cotton, plants situated there would be within the area of production if the proposal were adopted. In Louisiana, the data submitted show, all of the cotton compression and storage facilities in Caddo Parish, the largest cotton producing county in the State, are located in Shreveport, the second largest urban community in the State.41 The data submitted in support of the proposal also point out that cotton compress and warehouse plants are located in many of the most

^{**} Prehearing proposal, National Cotton Compress and Cotton Warehouse Association, p. 23.

J: Id.

citified communities in the country. Adoption of the amended proposal would provide exemption for the plants, it would appear, if it could be shown that any quantity of cotton is grown in the county. In brief, adoption of the proposal.

* Ibid., Appendices J and K. The material in these appendices was taken from the "Classification of Cotton Compresses, Warehouses and Wharves for Season 1945–1946." The most recent edition of this classification, for the season 1952–1953, prepared by the Cotton Warehouse Inspection Service, shows that warehouse facilities (and in most instances, compress facilities as well) are located in Birmingham and Mobile, Al 'ama; Los Angeles, Calif.; Savannah, Ga.; New Orleans, La.; Charlotte, No. Carolina; Chattanooga, Tenn.; Dallas, Fort Worth, El Paso and Houston, Texas; and Norfolk, Va., among others.

Tr. pp. 620, 640-641. The proposal, it seems clear, was intended to provide exemption for a plant physically located in a county in which any cotton was produced, not with standing that the operations of the plant were performed on cotton actually produced in other producing areas, no matter how distant. Thus, it was testified, such a plant should be considered within the "area of production" even if the cotton were produced in China (Tr. pp. 613-614, 617). In this respect, the proposal is very similar to that made on behalf of Walter Hohn and Co. That company bought tomatoes grown in Mexico, several hundred miles south, and sought exemption on the basis, presumably, that it was within the "area of production."

Although the cotton proposals were made on the basis of the physical location of the plant in an area in which cotton is grown, it seems clear that when extended to other commodities, such as fruits and vegetables, eggs, etc., the result would be, since practically every county in the United States has at least some production of some agricultural or horticultural commodity, that all of the operations named in the statute would be exempt.

The viewpoint of Mr. Todd, the representative of the Gotton Compress and Coron Warehouse Association, implies

would provide exemption for cotton gins, compresses and warehouses even in large cities and would require, in effect, that the Administrator find that in many of the most highly urbanized and industrialized cities of the United States; the economic influences of agricultural labor conditions are so significant as to affect the fixing of minimum wages and maximum hours.

Other representatives of industry who urged the adoption of a definition under which the Administrator would locate the physical limits of the area in which the particular commodity is grown presented maps on which were outlined the geographical areas which they thought were properly the "area of production." Such maps were presented on behalf of the Southeastern Peanut Association ", the Type 62 tobacco processors ", and

that if there is any production of any agricultural or horticultural commodity in a county, that county is a geographical area within which the Congress intended that the enumerated operations would be exempt. On this point, the testimony at tr. pp. 642-647 is most revealing. Mr. Todd pointed out that "The Supreme Court in that [Holly Hill] decision said nothing about being relatively near the production of the units serviced," and, further "I think what the Congress had in mind, in part at least, was that if a plant is located in an area where the commodity is produced, the economy of that area is largely controlled by agriculture; and I don't thing I made any difference to Congress whether some of the units handled by plants in such an area came from China or San Francisco or any other place."

⁴ Exhibit 24, Southeastern Peanut Association:

Exhibit 28, Type 62 Tobacco Processors.

the tung nut processors. These-proposals must similarly be rejected because their effect is to exempt all or practically all employees without distinguishing between urban-industrial and rural-agricultural communities.

Another group of proposals was quite frankly designed to exempt or deny exemption to a particular group of employers or a branch of an industry, without regard to the effect of the proposal on other employers or industries. representatives concerned primarily with grower-owned cooperative vegetable packing houses urged a definition which would provide exemption under section 13 (a) (10) for employees engaged in handling or packing freshvegetables as long as title to the commodity handled or packed is vested in the farmer. The proposed definition provided: "Agricultural commodities will be considered in the 'area of production' under the following conditions: First: That the agricultural commodity remains under the producer's ownership while on the premises of the market preparation facility * * *." Under this proposal, the witness testified, where the packer or handler of the commodity "becomes the possessor of this commodity he should be deemed outside of the "area of production." " It was readily apparent that the proposal would provide exemption only for the proponents and

^{*} Exhibit 43, American Tung Oil Association.

⁴⁷ Tr. pp. 31-33

by doing so, secure for them a substantial advantage over their competitors."

Proposals diametrically opposite in their effects were made in several instances by different representatives within the same industry. For the peanut industry, for example, it was recommended by one group of employers that the present definitions be amended so that "open country or rural community" exclude any town or city of any size (now 2,500 or more) and that the maximum mileage be reduced from 20 to 10 miles. Another group of employers in the peanut industry recommended that both the population and mileage tests be striken and in their place the Administrator define "area of production" as the geographical area in which peanuts are grown.50 The effect of the former proposal would be to deny exemption in all or practically all.

⁴⁸ See tr. p. 35, in which Mr. Pretzer admits that his proposal would discriminate against the independent packer who, he claims, has no real economic function.

A change in the definition with a similar objective was proposed by the Delaware Mushroom Cooperative Association. That Association proposed that the Administrator amend the regulations "so as to include all processors of mushrooms located within the Chester-Delaware-Newcastle Area as being within the area of production". The Fred Mushroom Products Company, in protesting against this proposal, stated "If this proposal would come into effect our plant located at Lebanon, Warren County, Ohio, would not be on a competitive prize basis with these other plants as we would have a higher labor cost." S. L. #3

⁴⁹ Tr. p. 291.

⁵⁰ Tr. pp. 319-320.

cases; the latter, to provide exemption in all, or practically all cases. A sweet potato packer recommended that the mileage test be increased from 15 to 40 miles and that the population test be changed to "all counties, that are primarily rural." 52 Another sweet potato packer from the same region urged that the area of production be limited to the farm on which the commodity is grown.53 All or practically all sweet potato packers would be exempt under the first proposal; none, or practically none, under the second. A canner of fruits and vegetables proposed a definition which he agreed would provide exemption for all or practically all canners; 54 an association of fruit and vegetable canners in the same geograpic area urged that "all factors considered, we believe that the present definition is as good as can be worked out to suit all segments of the canning industry. " Such opposite results of proposals are similarly apparent from the recommendations made by industry and labor representatives in a particular field. A representative of the fresh fruit and vegetable industry in the Yakima Valley stated that, under his proposed * * practically everything in the definition. Yakima, Wenatchee, the Hood River, the Med-

⁵¹ The proponents recognized this result, each of the other's proposal. See tr. pp. 295–296, 308–309.

⁵² Tr. p. 216.

⁵³ Exhibit 14, Steven J. Dupuis.

⁵⁴ Tr. p. 205.

⁵⁵ S. L. #7.

ford areas would be exempt * * *. The proposal of the labor representative of the industry in the same area, that representative testified, would have the effect that "No Yakima Valley commercial operator would be exempt."

The fact that a number of diametrically opposed proposals were submitted does not, of course, have any bearing upon the merit of any particular one. It emphasizes, however, the sharp conflict among those represented. To the extent that such proposals are directed toward changing the present definition without doing violence to the statutory intent they are considered below; to the extent that the proposals provide exemption on an all-or-none basis, they must be rejected for failure to conform to the statutory intent.

Population.—In addition to those witnesses who attacked the population test in the present definition as invalid, some witnesses urged that, even if valid as a test, the populations of a place is not determinative of its character as an agricultural or industrial community. They also urged that 2,500 is not appropriate as a dividing line. Much of the testimony of these witnesses consisted of general statements to this effect. In a few intances examples were given of towns, relatively close to each other geographically, one of which

⁵⁶ Tr. p. 118.

⁵⁷ Tr. p. 148.

See, for example, tr. pp. 87, 102.

exceeded, while the other was less than, 2,500. With respect to these it was stated that their character as industrial or agricultural was the same. Instances were cited of towns of more than 2,500 population of which it was stated that they were predominantly agricultural in character, and of towns with populations of less than 2,500 people, said to be industrial in character.

There were some instances in which a population test of 2,500, \$\infty\$000, \$10,000, or 20,000 was urged as a substitute for 2,500.\infty\$ No supporting evidence, however, was adduced indicating that any particular population figure would accomplish the objective more effectively; in each case, the suggested substitute appeared to be designed to eliminate the particular discriminatory result reported by the proponent.

Labor representatives who appeared at the hearing uniformly urged that the exemption be narrowed rather than extended by any changes in the definitions. Both the CIO and the AFL urged that the 2,500 population test be reduced to 500. As in the case of other proposals to change the population requirement, no evidence was offered to show that a test of 500 would more accurately distinguish between urban and agricul-

⁵⁰ See, for example, tr. pp. 174, 184.

See, for example, S. L. #4, and prehearing proposals of Defiance Milk Products Co., Batesburg Fertilizer Co. and Delaware Mushroom Coop. Assoc.

⁶ Tr. pp. 501, 786.

⁴² Tr. pp. 515, 789.

tural areas. One local AFL union in the fresh fruit and vegetable industry urged elimination of the population test and substitution of a test of dollar volume of production. Another AFL affiliate supported the proposal of the parent organization but its representative also stated "We have no real or substantial complaint to make concerning the existing definition."

The 2,500 dividing line in the present population test has a history of usage, almost half a century long, by various Government agencies, . including the Bureau of Census, Bureau of Agricultural Economics and the Federal Emergency Relief Administration. As the then-Administrator pointed out in promulgating the present definition. "It has furnished the definition of 'rural' communities which has been the basis of studies of rural and urban communities by many sociologists. It has been incorporated into statute by the Congress of the United States in special legislation for rural communities." A footnote appended at this point stated: "See, for example, 30 Stat. 356; 40 Stat. 1189, 'an act appropriating funds for the construction of rural post roads.' On the other hand the Rural Electrification Act-(7 U. S. C. A. Sec. 913) defines 'rural area' as

[&]quot;Inder this proposal, the minimum wage and overtime requirements would apply whenever the "amount of business in commerce (exceeds) \$10,000 annually." (Tr. p. 148). A comparable proposal, made by Hartford Packing Co., urged that the area of production be limited to canners producing 5,000 cases or less. See prehearing proposal of that company.

[&]quot;Tr. p. 495.

'any area of the United States not included within boundaries of any city, village or borough having a population in excess of fifteen hundred inhabitants." **

In preparation for the hearings held in 1945. and again after those hearings, the Administrator made extensive efforts to seek out and analyze available relevant information and data in order to determine whether criteria other than those used in the definition upon which the Supreme Court had ruled in the Holly Hill case, could be found. The alternatives examined included size of city; size of city and surrounding area; size of city, surrounding area and metropolitan districts; density of population; density of population and size of city; percentage of rural farm to total population; percentage of rural farm-population and size of city; gainful employment in agriculture as a percentage of total labor force; percentage of agricultural labor and size of city; percentage of farm acreage devoted to particular commodities; percentage of farm acreage and size of city; percentage of cropland harvested devoted. to particular commodities, percentage of cropland harvested and size of city; distance from which

⁶⁵ The Federal Aid Highway Act of 1944, Public Law 521, defined urban area as "an area including and adjacent to a municipality or other urban place of 5,000 or more, the population of such included municipality or other urban place to be determined by the latest available Federal census." Tr. p. 17.

produce is received; and mileage and size of city. In summary it may be stated that the search for alternative criteria was unsuccessful; the Administrator concluded that the mileage and population tests most effectively carried out his statutory duty to define "area of production."

Relatively few of the witnesses at this hearing offered any substitutes for the population and mileage tests as criteria for distinguishing agricultural areas. Among those representatives of the resh fruit and vegetable industry who appeared, however, some advanced in a general way a proposal based on "an area the economy of which is based upon agriculture" or a variant thereof, such as "an area where agriculture is part of the basic economy." 57 No data were introduced to show how effective the proposal would be in accomplishing the statutory purpose. In the questioning of these witnesses, I inquired as to how the proposal could be implemented, or if, as suggested by the witnesses, the concept were incorporated into the regulations, how it could be administered. The questioning failed to produce any but the most general and subjective standards. One witness arged that implementation would be provided by the use of the definition:

Record, 1944–45 Hearings on Area of Production, Economic Reports—Fresh Fruits and Vegetables (Nov. 1944), Cotton (Dec. 1944), Tobacco (Dec. 1944), Dairy Products, Poultry and Eggs (Jan. 1945), Grain, Seeds, and Dry Edible Berry Peas (Jan. 1945).

Tr. pp. 61, 104.

"an agricultural area is one in which the industry and its maintenance as a unit is based primarily on agriculture." Another urged that the Divisions seek out "evidence of the storekeepers where the money came from, evidence of the bank where the bank deposits came from." The same witness testified that "in the large proportion of cases it would be clear as a bell that the economy was primarily based on agriculture." 69' A third proponent of this concept recognized the subjective nature of the proposal; "there is a large segment that would clearly be industrial * there is a large volume of others that would be clearly agricultural. I will grant that you are going to have some that are in the middle, and that it would become, in effect, a matter for an employee in the Department of Agriculture or official who could fairly and realistically appraise the facts.". In short, none of the testimony indicated sources of information which could be utilized in developing objective standards, so that employers and employees could proceed with any degree of certainty as to their rights and obligations under the law. The complete subjectivity of the proposals was indicated by the fact that the first proponent of this concept applied it and concluded that Yakima, Washington is an industrial area the second proponent applied the concept

⁶⁸ Tr. p. 74.

⁵⁰ Tr. p. 259.

[°] Tr. p. 116.

and concluded that Yakima, Washington is an agricultural area; both, citing circumstances in which the application of the proposals would be clear.

Following the hearing, notwithstanding the difficulties inherent in the proposal and the fact that similar proposals were explored in connection with earlier hearings, at my request and with the approval of the Administrator, the Division of Research and Statistics undertook a survey of the total information available which might be of value in developing objective standards for the application of the proposals or other possible methods for distinguishing rural and industrial economics in particular localities. It was thought advisable to delay the decision in this proceeding until the survey could be completed. The search included known statistical compilations, directories and periodicals; a survey of information collected Government and nongovernment agencies. Representatives of Government and private agencies were also consulted concerning sources and procedures for obtaining the desired data.

Because of the emphasis during the hearing on income data as a determinant of the nature of local economies, the search undertaken by the Divisions emphasized income data and sought geographical distribution of such data. The most detailed geographical breakdown for which in-

Tr. pp. 74, 118.

of Internal Revenue data, which are distributed, by State rather than by smaller geographical units. Moreover, the data are not distributed by industry group, but rather by income type, e.g., wages and salaries, interest, dividends, etc. The complete absence of adequate data on income by industry group, distributed geographically by units smaller than States eliminated this particular approach.

Most promising for the purpose intended, it was found, were the census data on employment for urban places, classified by industry group. Such data, it was believed, would show the nature of employment in the geographic areas covered. Special tabulations were prepared by the Bureau of the Census at the request of the Divisions, classifying employment data by industry group in more detail than the published data. Efforts to evaluate these data revealed several inadequacies. An important inadequacy of the employment data was that such data are not available for places of less than 2,500 inhabitants. Another important

This defect, though significant, was not considered to have destroyed the value of the data, since the determination of the economic nature of all places of less than 2,500 population would not be practicable anyway because of the large work load involved in relation to time and budget limitations. (The 1950 census of population shows 14,264 such places in the United States.) This difficulty accounts in part for the assumption in the present regulations that establishments in such places are rural-agricultural rather than urban-industrial.

place of residence and industry group; the place of employment of the person enumerated is not necessarily the place where he resides. Census industry groupings include under both "agriculture" and "manufacturing" employment in operations among those for which exemption is provided under sections 7 (c) and 13 (a) (10) of the Act. Finally, since census data are gathered during April employment in agriculture is obviously understated if it is to be used for the purpose of reflecting the agricultural nature of a locality.

A significant example is the fact that census employment statistics for urban places include the employment statistics only of residents of those places. Since most farm workers do not live in cities or towns, employment data for urban places may not reliably indicate the extent of agricultural labor conditions to which these centers are subject. As a result such data would furnish an incomplete picture of the actual number of persons in the rural "labor market area" who work in agriculture. Moreover, there is no predictable relationship between the proportion of farm workers who live in urban places and those who live within the surrounding areas. The best available data on agriculture employment are county data.

[&]quot;Thus, included by the census in the industry grouping "agriculture", are persons employed in cotton ginning and compressing, corn shelling, sorting, grading and packing of fruits and vegetables and similar operations. Included by the census in the industry grouping "manufacturing" are the manufacture of food and kindred products, chemicals and allied products and other non-durable goods. These groupings include employment in canning, making dairy products, and tobacco stemming for which exemption may be available under sections 7 (c) and 13 (a) (10) of the Act.

Anthe information was developed it became. obvious)that inherent in the problem were apparently insurmountable difficulties including inade. quacies of available data and the fact that at some devel of evaluation arbitrary criteria must necessarily be used. Ultimately, the pyramiding effect of the inadequacies of the available data and the arbitrary criteria necessarily employed made apparent the practical impossibility of achieving a more effective method for classifying the econsmies of rural areas through the use of such data. This seemed true even though the results of the analysis made indicated that some places with population of 2,500 or more had economies which could be characterized as allied primarily to agriculture, while at the same time establishing the likelihood that, were the appropriate data available, some places with populations under 2,500 would probably be characterized as primarily nonagricultural, under the same criteria.

It appears from the record that the alternative criteria for the population test which were suggested at the hearing or studied thereafter, are subject to at least as many infirmities, are less workable and do not accomplish the desired result with any more precision than the population test. There seems little doubt that whatever means are adopted for distinguishing rural from urban and industrial from agricultural, the result can only be an approximation. No evidence was adduced at the hearing nor was any information obtained

thereafter tending to show that such a distinction may be more accurately made by a substitute for the population test; on the basis of all the information available, it is reasonable to conclude that there is serious doubt that a practicable substitute may be found.

On the basis of all the evidence, it appears that by and large, the economic influences affecting agricultural labor conditions have little or no force in plants located in urban areas, including towns, cities, metropolitan areas or other regions with a relatively high density of population, and the effect on agricultural labor conditions of applying the Act within such areas appears remote. A population test of 2,500 has historically been used to distinguish urban from rural. Studies of population tests other than 2,500 have failed to establish that they would effect such distinction with any more precision. The 2,500 test, while not precise enough to constitute a perfect method of distinguishing between industrial and agricultural conditions, is at least as precise as any other that has been considered. Accordingly, it still seems to be the best test available for accomplish; ing the objective.

Mileage.—During the course of the hearing, criticism was also leveled at the mileage test. Much of the criticism was, as in the case of the population test, directed at eliminating the test in its entirety. Other criticism was in the form of proposals to increase or decrease the mileage

requirement, the direction depending primarily on the proponent's basis belief as to whether the discriminatory results of the statutory provision should be minimized by extending or narrowing the exemption.

As has already been indicated in this report. some form of distance test has almost always been included in the Administrator's definitions. The very first definition of "area of production" incorporated a test relating to the distance of the establishment in which the enumerated operations are performed from the farm on which the commodities are grown. The present mileage requirement, differing for the various commodities and, in some instances, for the various operations on the commodities, has been evolved historically from the "immediate locality" provision of the first definitions and the "general vicinity" provision of later definitions. The decision of the U. S. Supreme Court in the Holly Hill case included the distance concept in the phrase "more or less near." The decision in the Traders Compress case specifically held that the test of "distance from which enterprises obtain commodities on which they perferm operations enumerated in the statute" is a relevant test for the Administrator to use. The court also pointed but that the test "was one of the basic criteria for the definition in the Addison case, and the [U. S. Su-

See, for example, tr. pp. 162, 216, 274, 534.

preme] court, impliedly at least, sanctioned its relevancy as a permissible economic factor."

The specific distances incorporated in the present definition were arrived at after extensive studies. From analysis of the available data. the Administrator concluded That "the longest hauls of agricultural or horticultural commodities normally occur when the commodity is moved to an establishment which has not been located principally to serve the nearby farms, but for reasons involving nearness to terminal facilities, markets, labor supply or other such considerations." " His report indicated that a great variety of economic factors affecting the decision as to appropriate distances was weighed. However, it is clear that in avoiding the impracticable task of making particular definitions for each of the 300 different commodities and for each of the large number of different geographical regions where many of the commodities are produced, he found it essential to do some grouping of commodities and averaging of distances.

Much of the testimony at the hearing indicated that the distance tests in the present definition have in fact served reasonably as a test in the demarcation of the area of production. The evidence was also convincing that in most instances since the present definition was adopted, there have been no substantial changes in the areas over

See, for example, tr. pp. 301, 429.

³ Findings of the Administrator, Dec. 18, 1946, p. 10.

which establishments reach to obtain the commodities on which the enumerated operations are performed.**

On the other hand, there was testimony to the effect that improved rural roads and an increase in the size and number of farm trucks have for some commodities in some areas, widened the source of supply." The evidence was also to the effect that these changes have been accompanied. by increasing efficiency of operation in the establishment and by technological improvement in plant equipment. For example, the testimony as to cotton ginning was to the effect that since 1947, the number of new gins and larger gins that have been built and the emphasis on mechanized transportation has meant that gins are now drawing cotton from greater distances than before. These newer gins, it was testified, are not only equipped to handle a larger volume but also to perform additional services . such as drying and lint cleaning, and to provide estorage facilities." It was urged that the mileage requirement for cotton ginning should be changed to conform with these developments. These representations were made on the basis of the generd knowledge of the witnesses. The only spe-

⁷⁸ See, for example, tr. pp. 119, 159, 229.

⁷⁹ See, for example, tr. p. 725.

for testimony indicating in general the tendency to increased industrialization of the cotton producing areas in Southeastern United States.

cific data submitted on the actual change in diso tances hauled showed that during the 1935-1936 season, 96 percent of cotton ginned at selected local markets had been hauled 10 miles or less, while during the 1947-48 season, 93 percent had been hauled 10 miles or less." This relatively minor change, the testimony established, has been accompanied by other changes in method of operation; more significant perhaps than, the change in distance hauled. The continuing decrease in the number of gins is indicative of the tendency toward the larger and more highly industrialized ginning establishment, located in a more industrialized community, and performing other operations (in addition to ginning) which were formerly performed at greater distances: from the farm.

⁸² There was testimony (tr. p. 671) that the number of gins has been reduced from 32,000 in 1902 to 7,568 in March 1951. It is interesting to note the amount of cotton ginned in the two periods:

Running Bales		Ru	Running Bales		
Vear	(Thousands)	Year Tr	housands)		
1900	10, 102	1949	15, 908		
1901	9,853	1950	9,908		
1902	10,588	19519	15,072		
1903	9,820	1952	14, 952		
1904	13, 451	1953	a 15, 381		

Oct. 1, 1953, forecast, U. S. Department of Agriculture. Sources: Agricultural Statistics, 1952, U. S. Dept. of Agriculture.

F Exhibit 36.

Cotton Production in the United States, Crop of 1952, Bureau of Census, U. S. Dept. of Commerce.

The Cotton Situation CS-149, Oct. 1573, Bureau of Agricultural Economics, U.S. Dept. of Agricultura,

Several witnesses argued that section 13 (a) (10) was incorporated into the statute to insure that the increased labor costs resulting from payment of the minimum wage and premium pay for overtime would not apply to operations where such increased costs would be passed back to the farmer. 83 In part, these witnesses were arguing that under the present definition increased costs resulting from the statutory minimum wage and overtime pay requirements are passed back to the farmer, contrary to the Congressional intent, as a result of which the definition is illegal. this sense, the argument is part of the major contention that both the population and mileage tests were illegal, discussed above. In another sense, however, the argument is to the effect that a mileage requirement restricts the farmer is making the best bargain for his produce. Such a position appears to attribute to the cost of labor a far more important effect in determining the market price of commodities than it has and fails to consider other significant price-determining factors. Thus, there was testimony which showed that an increase in labor cost to the cotton ginner may be absorbed in many ways including, for example, lower "per unit" costs achieved through higher volume, the performance of additional services so that overhead costs are distributed over a broader base, and obtaining cheaper services such

⁸⁸ See, for example, tr. pp. 619, 628, 672.

as electric power." The same witness testified also "I have gipned cotton for 50 cents a hundred and the farmer only received 20 cents a pound for the cotton. I have ginned cotton for 50 cents a hundred when he got 45 cents a pound for cotton."

As was true with the testimony on the population criterion, many of the recommendations on the mileage test were in conflict, and little or no evidence was offered to support the specific mileage proposed. Thus, in the peanut industry it was proposed by one industry representative to increase the 20 miles now in the definition to 50 miles and by another to reduce it to 10 miles." For sweet potatoes it was proposed by one group that the present 15 mile test be increased to 40 miles and by another that "area of production" be restricted to the farm on which the product is grown. Labor representatives uniformly urged that increasing industrialization generally makes it essential that the present mileages be reduced. The CIO proposed that each of the present mileages be halved." On behalf of the AFE it was proposed that 5 miles be substituted wherever the definitions now provide 10, 15, or 20 miles, and that 25 miles be substituted where the present

⁸⁴ Tr. pp. 694-702.

⁸ Tr. p. 700.

⁵⁶ Tr. pp. 291, 333,

^{**} Tropp. 216, 237 and Exhibit 14

[&]quot; Tr. p. 514.

definitions provide 50 miles." As in the case of proposals made by the employer groups, little or no eyidence was adduced in support of the proposed changes.

In promulgating the present definitions, the then-Admin trator referred specifically to the difficulties of selecting appropriate distances and the many factors to be considered. He stated:

.The selection of appropriate distances for the different commodities and groups of commodities has been no casy task, and was accomplished only after carefully weighing and synthesizing a large variety . of complicated economic factors. Among the many factors taken into consideration were the following: the kind of crop; the distances from which the establishments in each industry receive the agricultural or horticultural commodities upon which they perform the operations specified in the pertinent sections of the Act; the geography and topography of the various sections of the country in which the different commodities are normally produced; the location of the plants within these areas: the concentration of cultivation of the different commodities in various sections of the country; the pattern of concentration of agricultural production with respect to pthe location of the establishm at differences in practice as between single crop areas and diversified farming areas; the

so Tr. p. 789.

perishability of the commodities received; the extent to which the plants deal with a single commodity rather than a variety of commodities; the nature of the operations performed on the commodities received, including the degree of industrialization of the various operations; the number of hands or operations through which the particular commodity has moved since leaving the farm, including the possibility of passing increased labor costs back to the farmer; the marketing practices of the · particular industries; and the wage rates paid, and overtime practices in the valious. communities concerned with particular. commodities.

It seems clear that the Administrator's conclusions as to specific mileages were formulated only after careful consideration and study of pertinent information. That fact itself does not of course, render them inviolable. Indeed, it is axiomatic that economic factors of this type undergo continuous change in a dynamic economy. In addition, it is clear that a certain amount of grouping of commodities and averaging of distances was necessarily resorted to in establishing general rules, which are widely applicable. On the other hand, in view of the careful manner of their promulgation, it seems clear that the established distances should be changed only upon a clear showing that a need for change exists and

Findings of the Administrator, Dec. 18, 1946, p. 11.

upon the basis of comparable information as to the economic factors set forth above. The evidence adduced at the hearing was not of that kind; indeed, little, if any, evidence was offered of the basis upon which the proposals to change the distances were made.

There was testimony, however, which indicated that for some commodities data were not avail able at the time of the 1944-45 hearings, and that because of the grouping of commodities and averaging of distances, it is possible that the distances may not have been entirely appropriate. An example of an industry about which there was little data is the packing of dry edible beans in Maine, an industry which, it was testified. began commercial operations in 1947 and at the time of the hearing employed approximately 100 people. It is clear that at the time of the 1944-45 hearings the industry was practically nonexistent." This may be true also with, respect to operations on tung nuts, an industry whose first commercial yield appears to have been obtained in 1938 but where substantial tonnages were first produced in 1946.2 At the hearing, neither of these industries or branches presented substantial evidence of the normal length of haul or of other factors mentioned in the earlier finding. Representatives of the Maine dry edible bean

⁹¹ Tr. pp. 525-526, 537.

⁹² Tr. p. °743.

packing plants arged a 75-mile test on the basis of the topography of the State without establish ing the distances over which the plants reached for their sources of supply. Representatives of the tung industry proposed a 50-mile distance test, largely on the basis that tung oil competes with oil expressed from soybeans and thexseedcommodities with respect to which, it was testi fied, the definition now provides a 50-mile test." There would appear to be no doubt that competition for markets is an economic factor which the Administrator may consider in defining "area of production." On the other hand, it does not appear to me that the fact of competition, alone establishes a case for changing the present distance requirement; standing alone, that fact does not appear to have any necessary relationship with the normal hauling distance or other factors considered in determining the distance under the present definition of "area of production."

Other provisions of the definition.—In addition to the basic population and mileage tests of the present definition, several provisions were included to implement those tests. First, in connection with the population test, the present definition provides that topen country or rural community excludes not only any city, town or

^{*}The regulations specifically provide a 50 mile test for operations on soybeans. Flaxseed is not specifically mentioned in the regulations and therefore is subject to the 20-

urban place with a population of 2,500 or more, but also any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

three air line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000 or

five air line miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

This provision was included, in the present definition in part to accomplish the basic purposes of the definition by excluding from the area of production, establishments subject to urban-industrial labor conditions even though not located within the political boundaries of cities or towns. This provision also is effective in avoiding discrimination against employers becated within the limits of a town while giving a competitive advantage to employers whose establishments are located just beyond the town boundary.

Witnesses at the hearing did not, to any substantial extent, address themselves to this provision. Both the AFL and the CIO proposed amendment to provide bands of one air line mile for populations to 10,000; three, for populations to 500,000; tions to 5000; five, for populations to 500,000;

ten, for populations over 500,000," A representative of the sweet potato industry proposed a 10-mile band around cities with populations of 20,000 or more." The silence of other witnesses, however, on these provisions of the definitions, coupled with the fact that the few proposals made were not supported by evidence establishing a need for change, appear to support the conclusion that the provision is accomplishing the purposes intended.

Second, under the mileage test incorporated in the present definition it is not required that all the commodities be received from within the specified distances but rather that 95 percent of the commodities come from such distances. This provision was included in the definition in order that the exemption might apply despite the receipt of an occasional shipment from a remote or undeterminable source.

The hearing did not establish any substantial interest in changing or amending this provision of the definition. In a few scattered instances witnesses urged the substitution of 75 percent for 95 percent. The context establishes that in almost each instance the proponent was seeking to extend the existing mileage requirement. Such purpose should, if warranted, be accomplished

^{3.} Tr. pp. 514, 789.

⁹⁵ Tr. p. 216.

Tr. pp. 162, 274. See also prehearing proposals, Agri-

by the more direct method of changing the mileage. In any event, no specific evidence or arguments were offered in support of the proposed change.

Finally, the present definition incorporates the following provisions

The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

When adopted, the preceding calendar month was preferred to the alternative of the preceding calendar year because of the greater accuracy with which it reflects current operations. The preceding calendar month is, of course, more stable as a basis for computation than the preceding calendar week. Some witnesses suggested the current calendar week, month, or year, as an alternative at the hearing. However, questioning established that such a test is completely impracticable—there is no way to determine whether the Act's minimum wage and overtime pay provisions are applicable to any particular work while the work is done. No evidence was offered that the

Tr. p. 208.

preceding calendar month has resulted in inequities, or that there was need for change. No practicable way of making the determination on a current basis was developed at the hearing, nor did any proposal appear, under questioning, to provide a test with the same relative stability which also reflected current operations as does the preceding calendar month test:

SUMMARY AND CONCLUSIONS

- 1. The picture presented by the record is one of misunderstanding and confusion as to the purpose and scope of the statute, the authority of the Administrator, the effect of the existing regulations and the purpose, effect, and scope of the changes advocated at the hearing. Superimposed upon the background of confusion and misunderstanding were many sharp conflicts of interest, not only between labor and employers but also between different groups of employers—the cooperative against the independent, the employers in the high wage against the employers in the low wage areas, and employers who already have the exemption against those who do not.
- 2. Considerably less interest was evidenced in this hearing than in the previous hearings. Large segments of the major industry groups which employ approximately three-quarters of the employees who are affected by the definition, were not represented at the hearings.

- 3. Some of the definitions proposed at the hearing would include operations other than those enumerated in the law. Other proposals made would have the effect of extending exemption from the Act's minimum wage requirements to activities for which only the overtime exemption was intended by the Congress. Such proposals are beyond the Administrator's authority.
- 4. The hearing established that many proposals were made to change the definition in order that the proponents might be protected against the eventuality of future need. In most such cases, the proponents admitted that there was no present need for amendment or change of the definition.
- 5. In a few instances it appears that the present mileage tests were determined without benefit of data as to specific commodities. Such a result may have occurred in two types of situations: (1) that group of commodities characterized in the definition as "commodities not otherwise specified in this subsection" for which a general 20-naile distance test was established, and (2) new and small industries which either did not produce at all or had insufficient production volume at the time the distance test was established to provide any significant data. In appropriate instances of these kinds a change in the mileage requirements may be justified.
 - 6. The record contains uncontroverted eyidence of the discriminatory effects of the present defi-

inition of "area of production." Employers who may not vail themselves of the exemption provisions in Sections 7 (c) and 13 (a) (10) of the Act find themselves in direct competition with employers who may, Much of the testimony frankly recognized that discrimination is inherent in the statutory provisions. Some proposals were designed to avoid this discrimination by providing exemption for all or practically all employees in a particular industry or branch; others would have eliminated the discrimination by withholding the exemption from all employees. Some witnesses stated that it would not matter whether all competitors could take advantage of the exemption or not-the important consideration was that all should be treated alike. Other proposals were made which would have shifted the discriminatory effects of the definition from one group to another. Generally the evidence showed the results of such shifts would merely have been to. make the xemption available to the group urging the particular proposal.

7. Many proposals made during the course of the hearing are substantially identical with proposals made by the same proponents in previous bearings before the Administrator and in some cases before committees of the Congress in connection with proposed amendments to the Act. The reiteration of such previously rejected preposals is indicative both of the continuation of the problem and the difficulty despite years of experi-

ence and additional judicial review of achieving a new and satisfactory solution.

- 8. No change in the lines drawn by the previous definition which falls short of denying or granting the exemption to all employees in an industry can accomplish anything but a shifting of the discriminatory effect from one group to another. Moreover, the many attempts to draft revised and improved definitions, and the extensive studies made, have thus far proved unsuccessful in achieving a definition which is non-discriminatory and also carries out the Congressional intent. The only previous definition which was successful to a considerable degree in minimizing inequities was declared invalid by the Supreme Court in the Holly, Hill decision.
- 9. The present definition accomplishes the statutory purpose more effectively than any definition proposed at the hearing. Changes in the present definition within the limitations imposed by the decision of the U.S. Supreme-Court in the Holly Hill case would at best be only palliative in their effect. At worst, they would widen the existing areas of confusion and uncertainty and shift and intensify the inequitable effects. The only real and lasting solution to the problem is a legislative one.

RECOMMENDATIONS

1. I recommend that no change be made in the present definition of "area of production" and,

to the extent that the proposals made during the course of the proceeding constitute petitions for amendment of the regulations under section 536.3, I recommend that they be denied.

- 2. I recommend that the Administrator again represent to the Congress that revision of the statute is necessary to chiminate competitive inequities.
- 3. I recommend that the Administrator invite and give priority to petitions for a change in the distance test, under section 536.3 of the present regulations, from those industries which (1) had insufficient production volume at the time the distance test was established to provide any significant data, or (2) perform operations on that group of commodities included in the "not otherwise specified" category of the definition.

Nathan Rubinstein, Presiding Officer.

Washington, D. C., June 9, 1954.

Respectfully submitted.

Simon E. Sobeloff, Solicitor General,

STUART ROTHMAN, Solicitor,

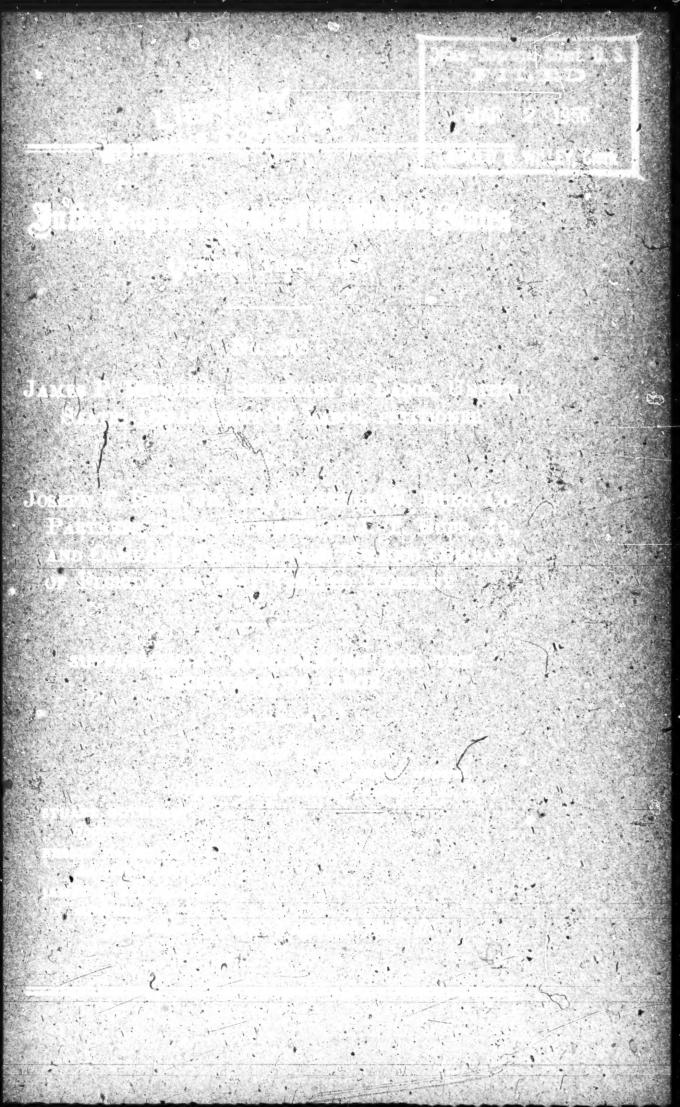
Bess: E Margolin, Assistant Solicitor,

JAMES R. BILLINGSLEY,

Attorney,

Department of Labor.

FEBRUARY 1956.



In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

1.

Joseph T. Budd, Jr., and Florence W. Budd, Co-Partners, Doing Business as J. T. Budd, Jr., and Company, King Edward Tobacco Company of Florida, and May Tobacco Company

SUPPLEMENTAL MEMORANDUM FOR THE SECRETARY OF LABOR

1. On the question of whether the bulking plant operation is "really incident to farming" (see Maneja v. Waialua Agricultural Company, 349 U.S. 254 at 266), the Government's brief points out the undisputed fact that farmers ordinarily do not perform this bulking process. Of approximately 300 farmers who grow this type of tobacco, only nine maintain and operate bulking plants, and only five, or 1.6%, maintain bulking plants.

processing only tobacco grown by the processor (R.K. 56). Eighty percent of the 300 farmers growing this type of tobacco grow less than 25 acres per year and the majority grow only from ·1½ to 10 acres per year (R. 36, 146). Thus respondent May which grows about 90 acres is by no means the ordinary small farmer with respect to this type of crop. May's acreage constitutes about 31/2% of the total acreage supplying the bulking plants in Gadsden County as shown in the exhibit introduced in the record by respondent King Edward (R.K. 84a). While 90 acres might not be an unusually large farm for some crops it is obviously quite a large-scale Type 62 tobacco farm, particularly in view of the admitted fact that "the cost per acre of production, and the price per acre which the farmer receives for his the highest of all agricultural crops produced in the United States, with the exception of other types of wrapper tobacco grown in other sections of the country" (See affidavits of J: D: Vrieze, General Manager of the King Edward Tobacco Company, and of Fred L. May, President of May Tobacco Company, R.K. 7, 67).

Thus the May Company is not simply an ordinary small farmer. It is undisputed that the ordinary small farmer growing this type of tobacco does not, and could not, economically own and operate a bulking plant. While the record does not show that the bulking plant of the May Company specifically is equipped with expensive equipment like that af the Budd and King Edward

plants, the May Company voluntarily intervened in the case on the ground of the similarity of its bulking operations to the King Edward operations, and the trial court found that the "May Tobacco Company case is in every respect similar to that of the King Edward Tobacco Company case" (R.K. 61). This finding seems wholly justified, not only by reason of May's voluntary intervention, but on the basis of the affidavit filed by the May Company, which describes its bulking operations in terms virtually identical to the descriptions by respondents Budd and King Edward (compare R.B. 26-28 and R.K. 50-52 with the May Company affidavit, R.K. 69-71).

That the bulking operation is an ordinary incident to the manufacture of cigars rather than an incident to farming (just as the curing, redrying and aging of non-cigar tobacco, after it is purchased at the auction warehouse by dealers and cigarette manufacturers, is an incident to the manufacture of cigarettes) is evident from the facts in the record relating to respondents King Edward and Budd. The sole purpose of this extended bulking process (which takes from six to twelve months or more) is to secure the proper flavor, aroma, burning qualities and, most importantly, the desired color and appearance for use as cigar wrappers (as the affidavit filed by the May Company, as well as the affidavit filed by King Edward, show, R.K. 8, 71).

The record shows that Budd's bulking plant (which purchases all of the tobacco it bulks) is closely affiliated with the Budd Cigar Company, the husband member of the partnership sucd in the instant case being the president of the cigar manufacturing company (R.B. 141-142). The cigar factory is at the same address as the Budd bulking plant, and over two-thirds of the tobacco bulked at the Budd plant is "sold, assigned or transferred" to the Budd Cigar Factory (representing a total value of \$586,857.17) (R.B. 141-142).

The record shows that respondent King Edward is closely affiliated with Jno. H. Swisher and Son, Inc., Carl F. Swisher being the president of the King Edward Company (R.K. 13) and that respondent King Edward leases all of the lands on which it grows tobacco from Swisher and Son, Inc., and sells over 50% of the tobacco it bulks to Swisher and Son (R.K. 13), Swisher and Son, of course, is a well known manufacturer of cigars in Florida and Georgia, notably of the King Edward brand. And King Edward purchases more of the total amount of tobacco bulked at its three plants than it grows itself, the record showing that in 1951 King Edward purchased from other growers about two-thirds of the total tobacco processed at its three plants (R.B. 13).

The record does not show whether the May Company is affiliated with any cigar manufacturer, but only that it sells and ships its bulked tobacco to cigar manufacturers (R.K. 68). Admittedly the record is more sparse on the May Company than it is on respondents Budd and King

Edward, inasmuch as the May C mpany was a voluntary intervenor. It may be noted, however, that the May Company also ffled a cross-motion for summary judgment (R.K. 66), and, since it is claiming an exemption, the burden was upon it to prove any differences from the King Edward operation. Thus if the record is inadequate as to the May Company, it is not entitled to have factual doubts resolved in its favor.

2. On the "area of production" issue, under Section 13(a)(10), respondents rely primarily on two lines of argument in attacking the reasonableness of the Administrator's 2,500 population standard (see Separate App. 20-25 and Supplemental App. 41-51, explaining the basis for adoption of this standard). Respondents' first line of argument rests on statements made by Senator Schwellenbach about the apple plant in Winchester. Virginia, to which reference was made in oral argument. In the thought that the pertinent citations to the Appendices may be helpful to the Court, the Government's answer to this argument is here summarized with the appendix references. The colloquy to which respondents and the amici refer is printed in the Government's Separate Appendix, page 62. It will be noted that Senator Schwellenbach was very careful to qualify his

At the time of the trial court's first memorandum decision, it was overlooked that motions for summary judgments had not been filed by or against the May Company. This was remedied by the subsequently filed motions and by the supplemental decision of the Court (R.K. 66, 76-77).

answer by stating that the exemption would apply Fif' the conditions of the proposed exemption were met. It will further be noted that there was no mention of the population of Winchester, Virginia, and there is no basis for assuming that Senator Schwellenbach, who was from the State of Washington, knew the population of Winchester, Virginia. That his answer had no reference to the meaning of "area of production" is evident from his following colloquy with Senator Black (printed on pages 64-65 of the Government's Separate Appendix), where Senator Schwellenbach made it clear that the meaning of that term would have to be defined administratively. It may be noted also that the proposed amendment to which Senator Schwellenbach was referring (which appears on page 53 of the Separate Appendix) did not at that time contain the provision for a definition by the Administrator. Finally, it is significant that Senator Schwellenbach was Secretary of Labor in December 1946 when the current definition was issued.

The second line of respondents' attack on the 2,500 population standard rests upon the statement of the Court of Appeals that in this particular case it is clear that the Administrator's standard is invalid. Even assuming that a standard designed for general application must operate accurately in every particular instance (and we think it clear that its validity would not be affected by its operation in a particular or a few particular cases), the very data on which respondents rely

in claiming that the town of Quincy is plainly a rural agricultural community, far from proving the unreasonableness of the Administrator's stand-t ard, in fact demonstrates the unreliability and impracticability of the more flexible alternative respondents propose. They rely primarily on the affidavit of the Manager of the Quincy Chamber of Commerce (R.K. 10). In that affidavit he states (on the basis of some private surveys made by him) "that the proprietors or managers of 78% of the business establishments in Quincy stated that their business is dependent directly or indirectly upon agriculture." (Emphasis added.) Even if this were not pure hearsay. obviously it does not follow that, because a business "indirectly" depends upon agriculture, it is therefore agricultural and not industrial. The affidavit also contains figures on the wage earners in Quincy (the source of which nowhere appears, and they are inconsistent with the Bureau of Census figures), but even on the basis of the figures stated in the affidavit less than one-third of the wage earners in Quincy are claimed to be employed on farms "either the year round or seasonally" (Emphasis added). Thus even with respect to this one-third, there is no indication to what extent they work part-time on farms and part-time in industry.

In contrast, the affidavit of the Director of Census of the United States Department of Commerce (R.K. 31-32) shows considerably more employment in manufacturing in Quincy than in

agriculture, forestry and fishery combined. According to these Census statistics, employment in agriculture, forestry and fishery constituted only about 15% of the total employment shown.

This is not to say that the Census data, either, is reliable for purposes of distinguishing rural and urban areas. As the hearing officer, in his findings after the 1951 hearings on "area of production," pointed out, there are obvious deficiencies in the Census data for purposes of making the distinction between rural and urban areas. But the point is that this evidence corroborates the Administrator's conclusion (after thorough and careful exploration of the feasibility of a flexible standard, see Government's Supplemental Appendix, pages 47-51) that the flexible standard here urged by respondents was wholly impracticable because of the unavailability of reliable data on which it could be based.

3. Counsel to respondents Budd and King Edward repeated in oral argument the statement made twice in their brief (pp. 41, 52) that the Government itself "admitted in this very litigation that a farmer's exemption under 13(a)(b) does not depend upon whether the independently owned packing plant which packs tobacco grown by others enjoys exemption under Section 13(a) (10)." We call attention to the fact, which respondents have failed to note, that the so-called admission quoted on page 44 of their brief was stricken by an amendment to the response to defendants' requests for admission, by substitution

of a simple answer that plaintiff "neither admits nor denies the matters contained" therein "since he is without such knowledge" and, in addition, since "said request obviously calls for a conclusion of law," (R.K. 55). As a matter of fact, the Secretary has filed suit against the American Sumulra Tobacco Corporation (the Company referred 3 to in the iso-called admission), which is pending in the District Court (N.D.Flat, Civ. Action No. 390).

4. In answer to Mr. Justice Frankfurter's inquiry is to what notice was given of the hearings preceding the adoption of the current definition of tarea of production. a notice was published in the Federal Register on January 6, 1945 (10 F.R. 261), specifically directed to the proposed definition with respect to tobacco. Notice was also published in the Federal Register prior to the 1951 hearings on proposals to amend the definition (16 F.R. 1741).

It may also be noted that the regulation defining the term itself includes a specific provision that any interested person or association wishing a revision may petition for amendment by submitting 'in writing to the Administrator as retition for amendment thereof, setting forth the changes desired and the reasons for proposing them's (29 CFR Section 536.3 (as amended 6 F.R. 1437)).

CONCLUSION

While it is our position that the trial court correctly held that the bulking operation is not inci-

dent to farming (under Section 13(a)(6) and 3(fr) nor among the operations enumerated in Section 13(a)(10), if this Court should conclude otherwise, the design of the Act to "equalize the impact of the Act" on all such similar processing operations (see Waialaa, 349 U.S. at 269) would best be achieved by holding the bulking operations of all three respondents to be operations under Section 13(a)(10) only. In that event, all of the bulking plants would be subject to the same limitation of "area of production".

Respectfully submitted,

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Мавен 2, 1956..

SEP 3 1 1955

HAROLD B. WILLEY, Clerk

No. 278

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955 .

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Pelitioner,

Joseph T. Bodd, Jr., and Florence W. Budd, Co-Partners, Doing Business as J. T. Budd, Jr., and Company, Respondents.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Petitioner,

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO COMPANY, Respondents.

On Petition for Writs of Certiorari to the United States
Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

MILTON C. DENBO 1625 K Street, N. W. Washington 6, D. C. Attorney for Respondents

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INDEX

PAG
OPINIONS BELOW
JURISDICTION
STATUTORY PROVISIONS INVOLVED.
QUESTIONS PRESENTED
STATEMENT OF THE CASE
ANGUMENT
I. The decision below, holding the packing plant employees of King Edward and May exempt under the agriculture exemption in the Act, is sustained by the correct construction of said exemption under applicable decisions of this and other courts; and there is no existing conflict or uncertainty among the circuits on this issue.
II. The decision below that the operations performed at the packing plants of all three Respondents are among the operations enumerated in Section 13(a)(10) is sustained by the correct construction of that exemption under applicable decisions of the courts; and there is no existing conflict or uncertainty among the circuits on this issue
III. The ruling below that the Administrator's definition of "area of production" is invalid to the extent that it excludes any town of 2500 or greater population is correct as applied to the factual situation here; and such ruling presents no real conflict with the decision of the Court of Appeals for the Tenth Circuit in the Traders Compress case
CONCLUSION
APPENDIX
Legislative History of Section 13(a)(10) of Fair Labor Standards Act

Citations

PAGE

CASES:

Addison v. Holly Hill Fruit Products, 322 U.S. 607
Armour v. Wantock, 323 U.S. 126.
Brune v. Hills Bros., 7 Labor Cases ¶61763: 17
Damutz v. Pinchbeck, 158 F.(2d) 882
D. M. NI DD OOG D (OC)
Farmers Irrigation Company v. McComb, 337
U.S. 755
Fleming v. Farmers Peanut Co., 128 F.(2d) 404 21
Jewell Ridge Coal Corp. v. Local No. 6167, 325
T 1 Ci 1 D a T 1 C T T
1
Manaja v Wajalua Agricultural Company 240
Maneja v. Waialua Agricultural Company, 349
U.S. 254
Messenger v. Traders Compress Co., 107 F. Supp. 354
Mill III 4 1 Di 101 Tilliano
Miller Hatcheries v. Boyer, 131 F. (2d) 283
THE DD CO I III APO DIONI ACA
National Metropolitan Bank v. U. S., 323 U.S.
Puerto Rico Tobacco Marketing Cooperative As-
sociation v. McComb, 181 F.(2d) 697
Sanabria v. Valiente & Co., 9 Labor Cases ¶62643 21
Sartor v. Arkansas Natural Gas Corp., 321 U.S.
GL'1 G'6 GOO TI G 404
Tobin v. Traders Compress Co., 199 F.(2d) 8,
cert. den., 344 U.S. 909, reh'g. den., 344 U.S.
U. S. v. American Trucking Associations, Inc.,
310 U.S. 534
Waialua Agricultural Co. v. Maneja, 178 F. (2d)
6-1
Walling v. Fairmont Creamery, 139 F.(2d) 318 31
Walling v. Halliburton Co., 331 U.S. 17
Ass'r 50 F Super 2000
Ass'n., 50 F. Supp. 900

			PAGE
	Walling v. Richmond Screw Anchor Co. (2d) 780, cert. den., 328 U.S. 870	, 154 F.	31 17
ST	ATUTES:		
	Agricultural Marketing Agreement Act as amended (48 Stat. 31, as amended; §601 et seq.). Fair Labor Standards Act of 1938, as a c. 676, 52 Stat. 1060; c. 736, 63 Stat. U.S.C. §201), et seq.: Sec. 3(f) Sec. 7(c) Sec. 43(a)(6) Sec. 13(a)(10) 3,4, 15, 21, 22	7 U.S.C. mended, 910 (29 2, 1 15, 2 3, 4, 5, 1 11, 12, 1	7, 18 4, 25 5, 21 3, 14,
MI	SCELLANEOUS:	d	
	Annual Reports to Congress of Wage & Public Contracts Divisions. Circular No. 249, U. S. Dept. of Agriculta "American Tobacco Types, Uses & Mage CCH Labor Law Reporter, V. 3, ¶23281 Hearings on H.R. 2033, Comm. on Edu Labor, 81st Cong., 1st Sess. Hearings on S. 49 and other bills, Sen. Congression Labor & Public Welfare, 80th Cong., 2d Hearings on S. 1349, Comm. on Edu Labor, 79th Cong., 1st Sess. H. Rep. 1452, 75th Cong., 1st Sess. H. Rep. 1453, 81st Cong., 1st Sess. H. Rep. 2182, 75th Cong., 3d Sess. Interpretative Builetin No. 14, U. S. Labor (3 CCH Labor Law Reporter WHM 35:351) Regulations, Part 516, Title 29, Ch. V;	re, 1942, irkets" 6 cation & c	20: 5, 7, 8 25 19 19, 28 19, 23 19, 23 10, 23
	Fed. Regs.		1 9

Reorganization Plan No. 6 of 1950 (15 Fed. Reg.	
3174), 64 Stat. 1263, 5 U.S.C. 133 z-15	
S. Rep. 884, 75th Cong., 1st Sess	1
U. S. Dept. of Agriculture Map Showing Cigar-	
Leaf Growing Districts of the United States	
	2
Following	4
WHM, 35:	
715	2
719	2
752-753	1
Webster's New International Dictionary, 2d ed.,	1
	0
	$\cdot 2$
W. W. Garner, "The Production of Tobacco"	6.
15 Fed. Reg. 3290	
17 Fed. Reg. 3509	0
19 Fed. Reg. 4481-4482	-
13' r ed. Neg. 4401-4402	5 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Petitioner,

JOSEPH T. BUDD, Jr., AND FLORENCE W. BUDD, CO-PART-NERS, DOING BUSINESS AS J. T. BUDD, Jr., AND COMPANY, Respondents.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Petitioner,

V

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO COMPANY, Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (RK 97, RB 212)¹ is reported in 114 F. Supp. 865 and also in 11 WH Cases

[&]quot;RK" references are to the record in King Edward and May; "RB" references are to the record in Budd.

643 and 24 Labor Cases \$67,897. The opinion of the Court of Appeals (Pet., App. A, pp. 33-41) is reported in 221 F. (2d) 406 and also in 12 WH Cases 458 and 27 Labor Cases \$\mathbb{G}69,105.

JURISDICTION

The judgments of the Court of Appeals herein (Pet., App. A, pp. 42-43) were entered on April 15, 1955 (RK 175, RB 256). An order, extending until August 1, 1955, the time for filing a petition for a writ of certiorari, was entered by Mr. Justice Black on July 8, 1955 (Pet., App. A, p. 43). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

These cases arise under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. §201) et seq., hereinafter called "the Act". Pertinent provisions of the Act and pertinent administrative regulations involved are set forth in Appendix B to the Petition, pp. 44-48.

QUESTIONS PRESENTED

1. Whether the exemption from the wage and hour provisions of the Act provided by Section 13(a)(6) for "any employee employed in agriculture", as "agriculture" is defined in Section 3(f), applies to the employees of Respondent King Edward, who are engaged at its tobacco packing plant in handling and preparing for market tobacco grown exclusively on its own farms.

The District Court also wrote a supplemental opinion which is not officially reported (RK130, RB223; 24 Labor Cases [68056).

- 2. Whether the same exemption applies to the employees of Respondent May, who are engaged at its tobacco packing plant in handling and preparing for market tobacco grown exclusively on its own farms.
- 3. Whether such employees and also the employees of Respondent Budd perform operation enumerated in the exemption from the wage and hour provisions of the Act provided by Section 13(a)(10) for
 - "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products".
- 4. Whether the Administrator's definition of the term"area of production" pursuant to Section 13(a)(10) of the
 "Act is invalid as applied to the factual situation here
 presented, insofar as it excludes from the "area of production" Respondents' tobacco packing plants solely
 because they are located in a town of over 2500 population,
 to wit, Quincy, Florida, which has a population of approximately 6500:
 - 5. If the Court finds that it is unable on the present Record to hold the exemption of Section 43(a)(6) applicable to the employees of Respondents King Edward and

Prior to May 24, 1950 the administration of the Act was in the hands of the Administrator of the Wage and Hour and Public Contracts Divisions. But effective on that date, the administration of the Act was transferred to the Secretary of Labor by virtue of Reorganization Plan No. 6 of 1950 (15 Fed. Reg. 3174), 64 Stat. 1263, 5 U.S.C. 133 z-15. The Secretary, however, has delegated back to the Administrator almost all of his functions in the administration of the Act. 15 Fed. Reg. 3290. In view of the foregoing, references are sometimes made in this brief to administration of the Act by the Secretary, who is the Petitioner herein, and at other times to administration by the Administrator.

May, or to hold that such employees as well as the employees of Respondent Budd perform operations enumerated in Section 13(a)(10) and that the "area of production" definition is invalid, whether the Court of Appeals erred in not reversing the summary judgments granted by the District Court against Respondents on the ground that the actions could not appropriately be decided on motions for summary judgment and in not remanding said actions to the District Court with instructions that they be decided only after full and complete trial of the issues.

STATEMENT OF THE CASE

Petitioner's statement of the case (Pet., pp. 3-10) is incomplete or inaccurate in many respects. Accordingly, Respondents submit the following statement:

Notwithstanding both the District Court and the Court of Appeals each wrote only one opinion herein, two separate actions are involved: (1) an action against King Edward and May, and (2) an action against Budd.

All three Respondents contend that the writ prayed should be denied. Respondents King Edward and May wish to point out, however, that as to them the writ prayed should be denied if, as they contend, the Court of Appeals correctly held that their packing plant operations are exempt under the Section 13(a)(6) agriculture exemption in the Act, regardless of whether such operations are also. exempt, as the Court of Appeals further held, under the Section 13(a)(10) area of production exemption. Respondents King Edward and May also contend, however. as does Respondent Budd, that the writ prayed should be denied because the Court of Appeals correctly held that their packing plant operations fall within the operations enumerated in Section 13(a)(10), that the Administrator's definition of "area of production" is invalid as applied to such operations, and that until a valid definition

is made excluding their plants from the "area of production", Petitioner is not entitled to an injunction against them. Respondent Budd does not claim that it is entitled to the exemption provided by Section 13(a)(6) and the Court of Appeals did not so hold. Consequently, contrary to Petitioner's statement of the questions (Pet., p. 2), no question is here involved as to the application of the agriculture exemption to Budd's employees.

In view of the foregoing, the facts as to the two actions here will be presented separately.

1. King Edward and May

The facts as to May and King Edward are essentially the same. For the sake of brevity and conciseness, we shall set forth the facts as to May and then indicate the differences as to King Edward to the extent that they may be deemed material.

May's business consists of planting, raising and harvesting eigar wrapper leaf tobacco on farms which it owns in Gadsden County, Florida and of curing, warehousing and packing such tobacco at its packing plant in Quincy, Gadsden County, Florida (RK 69-71, 117, 118), a town with a population of some 6500 (RK 18, 170-171).

May's farms have an aggregate acreage of approximately 2800 acres, including woodland, grazing land and general farm land. 423 acres are under cultivation (RK 148, 151) and of these, 90 acres are devoted to the planting, cultivating, growing and harvesting of United States type No. 62 cigar wrapper leaf tobacco (RK 70, 106, 117, 170). This type of tobacco is grown only in three counties in Florida and in two counties in Georgia adjoining two of those in Florida, and nowhere else in the world (RK 97-98, 118, 168).

⁴ RK 148 refers to a "columnar chart" filed by Respondents as an exhibit with the District Court at a pre-trial conference (RK 151).

May's tobacco is grown in fields on its farms under cheesecloth shade, which completely covers and encloses the fields (RK 101, 117, 118, 168-169). The fields are highly fertilized and intensively cultivated during the growing period (RK 101, 169).

In harvesting the tobacco, as each leaf reaches a certain state of maturity, it is promptly picked by May's employees and taken immediately to one of several curing barns located on the farm. There the leaf, in which the water content is at first 80 to 85 per cent, is strung, hung on sticks and dried (its water content being reduced to between 10 and 25 per cent) until it turns into a shade of brown. It is then taken down, packed loosely in boxes and carried to May's single packing plant located not more than ten miles from any of May's farms. This transfer from the curing barn to the packing plant must be prompt in order to avoid any harmful stoppage or acceleration of the intra-cellular changes that are continuously taking place within the leaf (RK 70.71, 101-102, 118, 120-121, 122-123, 148, 151, 169).

When the tobacco arrives at the packing plant, it is piled on the floor in piles or bulks of 3500 to 4500 pounds each for fermentation, and so remains from two to four months. During this period the bulks are taken down

Fermentation of tobacco is aging the tobacco to make it fit for human use. There are no exceptions to the rule that fermentation must take place before tobacco can be used. See excerpts from the book by W. W. Garner entitled "The Production of Tobacco" at RK 39. Mr. Garner is a noted plant physiologist, employed for 40 years by the United States Department of Agriculture in making scientific tobacco investigations (RK 26-27). The excerpts from his book referred to were attached as an exhibit to an affidavit offered by the Petitioner in opposition to King Edward's first motion for summary judgment, page 11, infra. The bulk method of fermentation is described in Mr. Garner's book at RK 43. et sea. See also Circular No. 249, U. S. Department of Agriculture, 1942, entitled "American Tobacco Types, Uses and Markets" p. 124, where it is stated that "Practically all tobacco goes through a process of aging . [which] renders it suitable for use".

from time to time and repiled or rebulked for the purpose of aerating the leaf and preventing excess fermentation in the interior of the bulk, and to assure that the natural changes in the leaves will be as uniform as possible throughout the entire bulk (RK 102, 118-119, 169; see also RK 45). After the bulking, the leaves are sprayed in order to keep them soft and pliable enough for handling without breakage or injury (RK 119, 124). Following this operation the leaves are sorted and graded and then rebulked in order to dry for a further period of from two to four months. The leaves are then baled for sale and shipment to cigar manufacturers (RK 102, 119, 170).

As held by the Court of Appeals below (RK 171-172, 170; see also RK 60), the operations of bulking, sorting and baling the tobacco at the packing plant are customary and necessary operations to prepare the tobacco for market. On the other hand, none of the tobacco is stemmed, cut or treated, and none is processed other than as previously described (RK 120). There is nothing in the Record to support Petitioner's assertion (Pet., pp. 4-5, 6) that May's packing plant operations require extensive or valuable industrial equipment, and the District Court in effect found otherwise (RK 132). Also, contrary to the impression Petitioner seeks to give (Pet., pp. 6-7), the operations are not mechanized and are performed by unskilled farm laborers. Infra, p. 9.7

The entire process of the treatment of the leaf, from the time it is first hung in the curing barn on the farm until bulk sweating in the packing plant is completed, is one continuous process of natural (see RK 170) transfor-

See Circular No. 249, U. S. Department of Agriculture, p. 85.

May's sales of tobacco from its packing plant have averaged between \$300,000 and \$350,000 per year for the past several years (RK 72, 125). The total 1952 tobacco crop harvested at its farms and handled at its plant was approximately 112,000 pounds green weight (Id.)

mation within the leaf, necessary to assure the desired color and appearance of the leaf, and is completed without adding any external catalyst or other chemical element or artificial stimulation. Only the temperature is regulated both at the barn and in the packing plant,8 in . order to prevent injurious acceleration or stoppage of the gradual and continuous natural internal transformation of the leaf. Such transformation is a process of drying and oxidation, accompanied by chemical changes within the leaf (RK 121-122).9 The chemical changes commence at the curing barn and continue throughout the bulk sweating at the packing plant. There is no dividing point between those which occur at the two places (RK 123-124; see also RK 40, 49). It is incorrect, therefore, for Petitioner to assert (Pet., p. 4) that May's curing barn operation is essentially a "drying" operation, while the packing house operation is a "fermentation" operation. In fact both are "drying" and "fermentation" operations and, as noted, together constitute one continuous process. The only reasons for moving the tobacco to the packing house from the barns are that there are insufficient barns on the farms to store the tobacco until bulking is completed, and the natural transformation within the leaf takes longer in the barns than in the bulking operations performed in the packing plant (RK 122; see also RK 40).

May employs approximately 70 employees in its packing plant at the height of the packing season and such em-

Atmospheric temperature is controlled to some extent in the barn, and the temperature of the bulks at the packing plant is controlled by taking down and rebuilding the bulks as previously described in the text (RK 121).

^{· &}lt;sup>9</sup> See also the Garner book at RK 31, 32-33, 34, 36, 38, 46-47, 48-52 which discuss such changes and their causes.

¹⁰ See further Circular No. 249, U. S. Department of Agriculture, p. 124, which states that "The chemical changes [effected by the fermentation] represent an extension of the curing process."

ployees are engaged in bulking, sorting, handling and baling of tobacco and shipping same to market (RK 69-70, 119-120, 171). All such tobacco is tobacco grown by May on its farms, as May does not handle tobacco grown by others (RK 70-71, 118, 125) and the District Court so found (RK 106) as did the Court of Appeals (RK 170). Approximately 90 per cent of the employees who work in the packing plant reside either on May's farms or adjoining farm lands in Gadsden County, Florida (RK 71-72, 120, 148, 151). Many of such employees work on May's farms in planting, growing, harvesting and barn curing the tobacco and thereafter they work on such tobacco in May's packing plant performing the operations heretofore described (RK 120).11 See also the finding of the District Court to like effect (RK 133-134) and the finding of the Court of Appeals that

"The majority of all such employees [those working at the packing plant] work also on the farms, when not engaged in work at the packing plants (RK 171)."

The parties stipulated (RK 112-113) that (a) May employs many of its employees "engaged in the handling of tobacco" in and about its place of business at Quincy, Florida, i.e., its packing plant, at wage rates less than 75 cents an hour, and (b) May does not keep the records of hours worked each workday and each workweek for its said employees as prescribed by the Administrator's Regulations, Part 516, Title 29, Ch. V, Code of Federal Regulations. This is the only evidence as to May's failure to comply with the minimum wage and record-keeping provisions of the Act. 12

¹¹ During the packing season May customarily transports these employees by truck from their homes on the farms to its packing plant (RK 72, 120).

¹² A similar stipulation appears in the Record as to King Edward (RK 80-81).

As already observed, in all material respects the facts as to King Edward are substantially the same as those set forth as to May (see RK 80-81, 84-92, 97-98, 101-102, 103-104, 110-111, 168-170), except that (i) King Edward's tobacco acreage is 206, instead of 90, acres (RK 170); (ii) some of the King Edward farms are 13, rather than 10, miles distant from its packing plant here involved (RK 86); (iii) the Record does not disclose how much the sales of tobacco from its said packing plant have averaged, nor does the Record disclose the weight of the tobacco crop handled by King Edward at said packing plant in any year;13 (iv) King Edward employs 120, instead of 70, employees at its said packing plant (RK 171); and (v) the Record does not show what percentage of the employees at said packing plant live on farms, but it does show that a "large proportion" do (RK 148, 151). Moreover, King Edward does not own but rather leases its farm lands and packing plant from an affiliated company.

2. Budd

Budd grows no tobacco of its own but operates a packing plant in Quincy, Florida, employing 108 persons (RB 90, 217, 252), at which it handles and prepares for market the tobacco grown by others on their farms (RB 212-213, 251), all located within a radius of 30 miles of Budd's plant (RB 59, 212, 249). Budd's packing plant operations are essentially the same as May's (RB 60-61, 72-74, 100, 201, 204). Its employees, who for the most part live all year around on the tobacco farms, work earlier in the year in growing the tobacco which they thereafter work on at Budd's packing plant (RB 62-63, 226, 252).

¹³ An affidavit of an employee of Petitioner (RK 23-24), which was offered in opposition to King Edward's motion for summary judgment, referred to page 11, *infra*, allegedly sets forth the poundage of all tobacco handled by King Edward at three packing plants that it operates, including the one here involved, but the affidavit gives no information as to the amount handled in said packing plant alone.

- 3. Quincy, Florida, is an agricultural community in which about 60 per cent of the income of the population is estimated to be farm income (RK 18). The principal source of cash income to Quincy comes from the raising of U.S. type No. 62 tobacco (RB 62). Employment on farms in Quincy and within one mile thereof is a substantial part of all employment in that area and moreover close to 50 per cent of the wage earners in the area reside on farms (RK 18).
- 4. Based upon the complaint against it and upon its. answer and supporting affidavits, King Edward moved for summary judgment (RK 10-19, 60, 99-100). With petitioner opposing the motion, the District Court denied it, holding that the action could not appropriately be disposed of on motion for summary judgment (RK 61-64). Subsequently, however, the District Court itself suggested that all parties file motions for summary judg: ment (RK 100, 151-152; RB 214-215), and when this was done (RK 82-84, 111-112, 116; RB 210-211), awarded summary judgment in each case to the Petitioner (RK 97-107, 135, 136-138; RB 212-221, 228, 229-231). The District Court held that Budd's packing plant employees are clearly subject to the Act (RB 218) and that with respect to King Edward and May, the exemption for agriculture in the Act ends when the tobacco reaches the receiving platform of the packing plant, and accordingly the packing plant employees are not exempt under the agriculture exemption (RK 106-107, 171). As for the "area of production" exemption of Section 13(a)(10) the District Court held, without assigning any reason, that such exemption also does not apply to the packing plant employees of King Edward and May (RK 106-107).

The Court of Appeals reversed the Judgment in both cases. It held that (1) the agriculture exemption in the

Act applies to the packing plant employees of both King Edward and May because the work of such eraployees

"in the preparation for market of the leaf grown exclusively on their farms, constitutes 'practices performed by a farmer as an incident to or in conjunction with such farming operations, including preparation for market' within the meaning of Section 203(f)" (RK 171-172);

and (2) the Section 13(a) (10) exemption in the Act applies to the packing plant employees of all three Respondents (RK 173, RB 254). In this latter connection the Court held that since all the work done in the packing plants is admittedly essential for the marketing of the tobacco, such work is among the operations enumerated in Section 13(a)(10). Id. The Court also recognized that the packing plants do not satisfy the condition in the Administrator's definition of "area of production" that they be located outside of a town of 2500 or more population, but it held that the Administrator exceeded his authority in excluding from the "area of production" any town of 2500 or more population, particularly as applied to the factual situation here presented (RK 172, note 7; RB 253, note 7). It further held that the Administrator was not entitled to an injunction until he made a valid definition of "area of production" because Respondents might "likely fall with [in] a valid definition" (RK 174; RB 255).

ARGUMENT

I

THE DECISION BELOW, HOLDING THE PACKING PLANT EMPLOYEES OF KING EDWARD AND MAY EXEMPT UNDER THE AGRICULTURE EXEMPTION IN THE ACT, IS SUSTAINED BY THE CORRECT CONSTRUCTION OF SAID EXEMPTION UNDER APPLICABLE DECISIONS OF THIS AND OTHER COURTS; AND THERE IS NO EXISTING CONFLICT OR UNCERTAINTY AMONG THE CIRCUITS ON THIS ISSUE.

- 1. Despite Petitioner's contrary contention (Pet., pp. 21-24), the decision of the Court of Appeals, holding the packing plant employees of King Edward and May exempt as being "employed in agriculture", is consistent with this Court's recent decision in Maneja v. Waialua Agricultural Company, 349 U.S. 254.
- (a) In the Waialua case this Court held that the sugar milling operation of a large Hawaiian sugar plantation was not within the agriculture exemption in the Act, even though the only sugar cane milled was that grown by the plantation itself on its own farm. Recognizing that the status of farmers milling their own sugar vis-à-vis the agriculture exemption may well be sui generis (349 U.S. at 267), this Court placed major emphasis upon the omission of sugar milling from the exemption of Section 13(a)(10). Id. Bearing in mind the purpose of Section 13(a)(10) to prevent discrimination against the small farmer (id., p. 268); this Court held that Congress would not have omitted sugar milling from the "area of production" exemption of Section 13(a)(10) if it had not concluded that it also fell outside the agriculture exemption. Id.

But the Court's discussion makes it clear that if an operation, such as canning, packing, or ginning, is in-

cluded within the "area of production" exemption, it is likewise within the agriculture exemption when performed by a farmer upon his own products. Id. And the Court also made it clear that in its view most forms of processing of agricultural commodities—other than sugar milling—are in fact included within the "area of production" exemption. Id.

Petitioner objects that this construction of the agriculture exemption gives companies like King Edward and May a decided advantage over small farmers, who cannot have their tobacco prepared for market by employees exempt from the Act, because allegedly the tobacco packing plants in which they have their tobacco so prepared are outside the "area of production" as defined by the Administrator (Pet. pp. 23-24). But the decision in the Waialua case, that an operation was included in the agriculture exemption only if it was also included in Section 13(a)(10), was not made to turn upon whether the "area of production" definition was also satisfied. Indeed the Court specifically stated that cotton ginning, if performed by the farmer upon his own crops, is exempt under the agriculture exemption (349-U.S. at 267) and it implied as much with respect to canning and packing and in fact most forms of quasi-industrial processing of agricultural commodities other than sugar milling, because all such operations are also enumerated in Section 13(a)(10). Id., p. 268. Yet, undoubtedly, many gins, canneries and packing plants are located in towns of .2500 or more population and hence do not meet the Administrator's definition of "area of production". See p. 29 infra. Petitioner's argument would inevitably lead to the conclusion that a farmer is never exempt under the agriculture exemption in canning, packing, ginning, etc. his crops for market, because, as the Administrator has recognized, there are always some independent plants engaged in the same activities which do not fall within the "area of production" as defined by the Administrator. See Administrator's Findings published in connection with his definitions of "area of production" (Pet., App. B, p. 52).

The legislative history is also clear that while Congress sought in Section 13(a)(10) to prevent discrimination against the small farmer, it did not make the Section 13(a)(6) exemption dependent upon whether it had succeeded in every instance in preventing such discrimination. *Intra*, pp. 18-19, Appendix pp. 32 et seq. 11

- (b) Another factor, upon which this Court relied in excluding from the agriculture exemption the sugar milling operation in the Waialua case, was that sugar milling is specifically granted a complete exemption from the overtime requirements of the Act by Section 7(c). 349 U.S. at 267. But no comparable exemption is specifically granted in Section 7(c) to the operations involved here upon tobacco; in fact tobacco as such is not even mentioned in Section 7(c).
 - (c) This Court also pointed in the Waialua case to the fact that sugar milling operations are not a normal incident to the cultivation of sugar cane in Hawaii. 349 U.S. at 267. The situation here is totally different for 70 per cent of all type 62 tobacco grown in the Quincy area is bulked and prepared for market in the packing plants of the growers (RK 102). 15

that his "area of production" definition has itself created competitive inequities (Pet., pp. 19-20, notes 8 and 9; 19 Fed. Reg. 4481-4482). See also the Petitioner's admission in the Budd case that Section 13(a)(10) "is a complete section in itself and cannot be defined or interpreted by reference to other sections of the 'Act' (RB 89).

The District Court found that of the 2554 acres planted with this type tobacco in the Quincy area, 1459 are grown by companies operating packing plants in which they handle only tobacco grown by themselves, and an additional 311 acres are grown by companies which handle in their own packing plants the tobacco grown on such acreage and also tobacco grown by independent farmers (RK 102).

- (d) Other factors emphasized in the Waialua case as of significance in determining the application of the agriculture exemption are also present here:
- (i) The product resulting from Respondents' operation is fermented tobacco. Fermentation involves only natural—not artificial—changes in the tobacco (supra, pp. 7-8), and the Court below so held (RK 170). No basis exists therefore for analogizing the process involved here to manufacturing. 349 U.S. at 264-265.
- (ii) The same working force works on the farms and in the packing plant. Supra, 19. 349 U.S. at 265.
- (iii) There is no industrialization involved in the tobacco packing operation. Supra, pp. 6-8; see also RK 132. 349 U.S. at 265.
- 2. The decision below is likewise in full harmony with this Court's only other decision relating to the agriculture exemption in the Act, namely, Farmers Irrigation, Company v. McComb, 337 U.S. 755. There this Court said with respect to the work of the cooperative irrigation company involved (337 U.S. at 766):
 - "... coming to the second branch of the definition of agriculture... it does constitute a practice performed as an incident to or in conjunction with farming. If the Act exempted all such practices, the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm."

[&]quot;15 Although not relevant here, there is the additional requirement that the practices be incidental to 'such' farming. Thus, processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture. Bowie v. Gonzalez, 1 Cir., 1941, 117 F. (2d) 11". [Emphasis supplied]

This Court thus clearly stated that the processing of farm commodities is incidental to or in conjunction with the farming operation by which the commodities are produced. It accessarily follows that the processing by the farmer of commodities produced by the same farmer is incidental to or in conjunction with the farming activities of that farmer, and hence is within the agriculture exemption. That is precisely the situation involved here.

3. The decision below is not only consistent with this Court's decisions; it is obviously correct under the statutory language, its legislative history, and its administrative construction. Thus:

"Employment in agriculture is probably the most far reaching" of the exemptions in the Act. Addison v. Holly Hill Fruit Products, 322 U.S. 607, 612. "The exemption was meant to embrace the whole field of agriculture..."

Maneja v. Waialua Agricultural Company, 349 F.S. at 260.

The statutory definition of "agriculture" (Section 3(f)) is divided into two distinct branches. The first distinct branch is "farming in all its branches and among other things includes the cultivation and tillage of the soil, the production, cultivation, growing, and harvesting of any agricultural ... commodities ...". See Farmers Irrigation Co. v. McComb, 337 U.S. 755 at 762. The second distinct branch of the statutory definition of "agriculture", which this Court has termed the broader meaning (id.), includes "practices ... performed by a farmer or on a farm as an incident to or in conjunction with such

The following lower court decisions likewise support the existence of the agriculture exemption in the circumstances here presented: Walling V. Rocklin, 132-F. (2d) 38 (C.C.A. 8); Damntz V. Pinchbeck, 158 F. (2d) 882, 883 (C.C.A. 2); Bruno V. Hills Bros., 7 Labor Cases 561763 (D. P. Rico); Jordan V. Stark Bros., 6 Labor Cases 561468 (W. D. Ark.). See also Dofflemeyer V. NLRB, 206 F. (2d) 813 (C.C.A. 9); NLRB V. Campbell, 159 F. (2d) 184 (C.C.A. 5).

farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". This part of the definition embraces "practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm". Id., 337 U.S. at 763.

Since King Edward and induct the farming operations enumerated in Sect of producing, cultivating, growing and harvesting o, they are "farmers" in the sense used in that Section As to their packing plant operations, which are performed only upon their own tobacco (supra, pp. 9, 10), both the District Court (RK 101-102) and the Court of Appeals below (RK 171-172, 170) found, in accordance with the undisputed facts in the Record, that such operations are essential preparatory steps to marketing the tobacco (RK 60, 89 et seq., 121 et seq.; see also R. 39 et seq.). The undisputed facts further show that the entire process of caring for the tobe o, from the time that it is first hung in the curing barns on the farms until the time the bulking is completed in the packing plant, is one continuous and integrated process, largely performed by the same employees who grow and harvest the tobacco on King Edward's or May's farms. Supra, pp. 79. The packing plant activities are accordingly exempt as being practices "incident to or in conjunction with" farming, as the Court below held (RK 172).

The all-embracing scope of the "agriculture" exemption is fully borne out by its legislative history. Senator Black, Chairman of the Senate Committee on Education and Labor and in charge of the bill that became the Fair Labor Standards Act, stated that bottling milk, packing apples, ginning cotton, slaughtering and preparing hogs for market—all highly industrialized operations—were intended to be exempt if such operations were performed by a farmer upon his own proface. S1 Cong. Rec. 7656.

Senator McGill's amendment providing that the agricultural exemption should apply not only to practices ordinarily performed by a farmer as an incident to his farming operations, but also to practices performed on a farm as an incident to such farming operations. 81 Cong. Rec. 7888. His amendment further added to the exemption the words "delivery to market". The stated purpose of the McGill amendment was to exempt all kinds of work done on a farm so long as it was incidental to agricultural purposes and was preparatory to marketing the field crop, and all kinds of labor performed in connection with delivery to market of agricultural products. 81 Cong. Rec. 7888, 7927, 7928.

The foregoing analysis is in full harmony with the administrative interpretations of the agriculture exemption by Petitioner and the Administrator. See Interpretative Bulletin No. 14. U. S. Department of Labor, issued August 1939 and still outstanding (3 CCH Labor Law Reporter ¶24,488 and WHM 35:351) ¶¶10, 10(b), (c), (d), (e) and (f) and ¶12; Hearings on S. 1349, Comm. on Education and Labor, 79th Cong., 1st Sess., p. 236; Hearings on H. R. 2033, Comm. on Education and Labor, 81st Cong., 1st Sess., pp. 79, 97; WHM 35:752-753; see also Petitioner's admissions in the Budd case (RB 88-89).

· Interpretative Bulletin No. 14, ¶¶10 and 10(b), states that where a farmer performs the type operations here

The legislative history shows that Congress started with a very broad, comprehensive definition of agriculture, and that such definition at every stage of its consideration by one or the other of the Houses of Congress, as the bill worked its way through to passage, was made more and more all-inclusive. Maneja V. Waialua Agricultural Co., 349 U.S. 254, 260; S. Rep. 884, 75th Cong., 1st Sess., p. 6; 81 Cong. Rec. 7648; H. Rep. 1452, 75th Cong., 1st Sess., pp. 4-5, 11; H. Rep. 2182, 75th Cong., 3d Sess., pp. 2; 8; 83 Cong. Rec. 9162-9163, 9246-9247. Without the broad definition of "agriculture" which was written into the bill, it is a reasonable conclusion from the legislative history that the bill would not have been enacted into law (83 Cong. Rec. 7393, 9257).

involved upon only his own tobacco, such operations fall within the agriculture exemption; and unlike the similar administrative interpretation as to sugar milling (see Waialua case, 349 U.S. 254 at 269), the interpretations as to tobacco processing have never been altered. In these circumstances Petitioner's present effort, which is also his first effort,18 to alter such interpretations is contrary to this Court's holding in Walling v. Halliburton Co., 331 U.S. 17, 25-26 19 (cf. U. S. v. American Trucking Associations, Inc., 310 U.S. 534, 549), particularly since such altered interpretations are inconsistent with the language of the exemption provision, its legislative history, the case law, and with Petitioner's continued recognition of the exemption of processing of other commodities such . as fruit packing and canning, canning dairy products, and cotton ginning. Skidmore v. Swift, 323 U.S. 134, 140; Jewell Ridge Coal Corp. v. Local No. 6167, 325 U.S. 161, 169.

Wage and Hour Office has been maintained in Florida, manned with personnel engaged in the enforcement of the Act. Annual Reports to Congress of the Wage and Hour and Public Contracts Divisions: 1939, Chart XVII, p. 122: 1948, Chart 1, page 3: 1951, p. ii; 1953, p. iii. Frequent inspections have been made through the years of tobacco packing plants in the Quincy area to check on compliance with the Act. At no time until the present case have the Petitioner or Administrator sought to enforce the Act with respect to employees of such packing plants, when the plants handle and prepare for market only the tobacco they grow themselves. To the contrary, in administering the Act, the Wage and Hour officials have always treated such employees as exempt.

¹⁹ See also Miller Hatcheries v. Boyer, 131 F. (2d) 283 (C.C.A. 8).

THE DECISION BELOW THAT THE OPERATIONS PERFORMED AT THE PACKING PLANTS OF ALL THREE RESPONDENTS ARE AMONG THE OPERATIONS ENUMERATED IN SECTION 13(A)(10) IS SUSTAINED BY THE CORRECT CONSTRUCTION OF THAT EXEMPTION UNDER APPLICABLE DECISIONS OF THE COURTS; AND THERE IS NO EXISTING CONFLICT OR UNCERTAINTY AMONG THE CIRCUITS ON THIS ISSUE.20

- The legislative history of Section 13(a)(10) fully supports the ruling below (RK 173, RB 254) that Respondents' packing plant operations are among the activities enumerated in Section 13(a)(10). That history shows that Congress intended to exempt workers engaged in processes necessary for the marketing of agricultural products, including tobacco, and particularly the "first processing of things that come off the farm" (Addison v. Holly Hill Fruit Products, 322 U.S. 607, 612; 83 Cong. Rec. 7401, 7407-7408, 7428). Moreover the ruling below is in harmony with the other decided cases: Puerto Rico Tobacco Marketing Cooperative Association v. McComb, 181 .F. (2d) 697, 698-699, 701-702 (C.C.A. 1); Fleming v. Farmers Deanut Co., 128 F.(2d) 404, 407 (C.C.A. 5); Sanabria v. Valiente and Co., 9 Labor Cases ¶62643 (D. P. Rico).
- 2 The decision of the Court of Appeals is also clearly correct on the facts of record. So far as King Edward and May are concerned, the only evidence of any alleged

²⁰ If this Court concludes, as we believe it should, that for the reasons set forth in Point I of our Argument, the writ praved should be denied as to King Edward and May, Points II and III of our Argument apply only to Budd. Obviously the question of the application of the Section 13(a)(10) exemption to the operations of King Edward and May is immaterial if the Section 13(a)(6) agriculture exemption applies to them.

violation of the Act appears in a stipulation, stating that many employees at their packing plants, engaged in the "handling" of tobacco, are paid wage rates less than 75 cents per hour (RK 80-81, 112-113). "Handling", of course, is an operation specifically listed in Section 13(a) (10).

Elsewhere in the Record, it appears only that the employees at all three Respondents' packing plants are engaged in bulking, shaking, sorting, separating, grading, tying and baling tobacco. Supra, pp. 8-9; RB 201; 204. All such operations fall squarely within the terms "handling", "packing", "storing" and "drying", both as commonly understood (Webster's New International Dictionary, Unabridged Version, 2d. ed., 1951, pp. 793, 1133, 1750, 2486) and as defined by the Administrator (Interpretative Bulletin No. 14, WHM 35:351, ¶¶26, 27, 28 and 32). Petitioner's unsupported statement (Pet., p. 25) that the term "drying" does not include the bulking operation here involved is in conflict not only with Interpretative Bulletin No. 14, ¶32, but also with the uncontradicted facts of Record, which show that the bulking operation is indeed a "drying" operation (RK 87, 89, 91, 119, 121-122, 123; RB 60-61, 72-73, 100; see also the expert evidence appearing at RK 46-47).

3. Petitioner's assertion (Pet., p. 26), that tobacco bulking is a "manufacturing operation" in the course of which the tobacco is very substantially "changed from its 'raw or natural state'" into an industrial product and is no longer an "agricultural or horticultural commodity".

²¹ Petitioner seeks to convey the impression that Respondents' packing plant operations are complex, extensive and industrial (Tet., pp. 24-26). The facts of Record show otherwise. Supra, pp. 6-8. In any case Petitioner has himself admitted that operations may be exempt under Section 13(a)(10), even though they are complex and industrial, e.g. packing and drying fruits. Interpretative Bulletin No. 14, \$\frac{1}{27}\$; 32.

within the meaning of Section 13(a)(10), conflicts with the statutory language, the Record, the finding of the Court below, and the legislative history underlying Section 13 (a)(10).

The words "in their raw or natural state" in Section 13 (a)(10) are not separated by a comma from the word "preparing" but come immediately after that word. Hence, they modify only that word and not the words "handling", "packing", "storing" and "drying". Moreover, in any eyent, the Record shows that fermenting tobacco through the bulking process, like the ripening operation on fruit, involves no artificial change in the tobacco, but only natural chemical changes within the tobacco leaves, without the application of heat or any other external element by human means (supra. pp. 7-8), and the Court below so found (RK 170).

As for the legislative history, it shows that as the exemption was first introduced in Congress, it was limited to the operations of preparing, packing and storing fresh fruits and vegetables in their raw or natural state (St Cong. Rec. 7876, 7949); but was subsequently broadened to include these operations upon all agricultural commodities in their raw, natural or dried state (82 Cong. Rec. 1783, 1784; H. Rept. No. 2182, 75th Cong. 3d Sess., p. 2) and finally, broadened still further by the adoption in the House of the Biermann amendment, which contained language very much like that in Section 13(a)(10) as finally enacted. 83 Cong. Rec. 7401, 7407-7408. In the face of this history, no basis exists for restricting the term "ag-"eultural commodities" to the narrow meaning which Petitioner would ascribe to it. In the absence of any special statutory definition, the term should be given its commonly understood meaning (Addison v. Holly Hill Froit Products 322 U.S. 607, 618) and within such comeven meaning, tobacco; although fermented, is still an agricultural commodity.

4. Petitioner argues that since the operations here involved constitute first processing within the medining of the limited overtime exemption granted by Section 7(c), they cannot be deemed included under Section 13(a)(10), for then the Section 7(c) exemption becomes meaningless (Pet., pp. 26-28).

But the Administrator's interpretations of long standing include the operations here involved, i.e., fermenting and drying tobacco, in both the "first processing" exemption of Section 7(c) and the exemption of Section 13(a) (10). See Interpretative Bulletin No. 14, ¶¶20 and 32 and also a statement submitted by the Administrator to a subcommittee of the Senate Labor Committee in 1943. Hearings on S. 49 and other bills, Sen. Comm. on Labor & Public Welfare, 80th Cong. 2d Sess., p. 86; WHM 35:715, 719.22 Furthermore, there are many other, operations which Section 7(c) specifically exempts and which Section 13(a) (10) also specifically exempts, viz., the ginning and compressing of cotton, the first processing of milk into dairy products, and the first processing (including drying-see Interpretative Bulletin No. 14, 119), canning or packing of fresh fruits or vegetables. True, the Section 7(c) exemption for these operations is not restricted to employees employed within the "area of production"; but to the extent that employees are engaged in these operations within the "area of production", it is plain that the Sections 7(c) and 13(a)(10) exemptions overlap. This overlanning, which was recognized by the Court below (RK 173-174).23 is due to the solicitude of Congress in enacting the

The interpretation now urged by Petitioner that the operations here involved do not fall within Section 13(a)(10) is a comparatively new interpretation (cf. note 24, infra) which seeks to-overturn the prior interpretations of long standing. As such it is entitled to no weight. See cases cited supra, p. 20.

²³ Cf. Waialua Agricultural Co. v. Maneja, 178 F. (2d) 603, 609; (C.C.A. 9).

law toward agriculture and industries engaged in processing agricultural commodities. See in particular 83 Cong. Rec. 7325, 7326, 7401, 7402, 7407-7408; and see also 81 Cong. Rec. 7648-7673, 7876-7888, 7927-7929, 7947-7949, 7957 and 83 Cong. Rec. 7419, 9162-9163, 9250, 9252 and 9254.

And even with respect to the part of Section 7(c) which is restricted to employees within the "area of production", namely, first processing of agricultural commodities, that exemption and the exemption in Section 13(a) (40) overlap in many respects. Thus, for example, the drying of furs or hay is the first processing of an agricultural commodity within the meaning of Section 7(c) and also constitutes the drying of an agricultural commodity within the meaning of Section 13(a)(10). Interpretative Bulletin No. 14, 77 20, 32.

5. Contrary to Petitioner's contention (Pet., pp. 28-29) the interpretation of Section 13(a)(10), which he seeks here, was not ratified by the 1949 Amendments to the Act. Not only was such interpretation never reported to Congress (cf. Maneja v. Waialua Agricultural Co., 349 U.S. 254, 269), but as late as 1948 Congress was advised that Petitioner's interpretation was to the contrary. Supra. p. 24.24 Moreover, Congress' consideration of Section 13(a)(10) in 1949 was only in connection with the problem of the "area of production" limitation and not in connection with the problem of what activities are embraced by the section. See conference report on 1949 Amendments, H. Rep. 1453, 81st Cong. 1st Sess., p. 28.

Note also that until November 1948 or for some ten years after the law was enacted, the Administrator had outstanding a special definition of "area of production" for Puerto Rican leaf tobacco. It was plain under that definition that the operations of bulking and fermenting tobacco were considered operations described in Section 13(a)(10). 3 CCH Labor Law Reporter, 123281, note 1.

THE RULING BELOW THAT THE ADMINISTRATOR'S DEFINITION OF "AREA OF PRODUCTION" IS INVALID TO THE EXTENT THAT IT EXCLUDES ANY TOWN OF 2500 OR GREATER POPULATION IS CORRECT AS APPLIED TO THE FACTUAL SITUATION HERE; AND SUCH RULING PRESENTS NO REAL CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IN THE TRADERS COMPRESS CASE.

1. Tobin v. Traders Compress Company, 199 F. (2d) 8, cert. den. 344 U.S. 909, reh'g. den. 344 U.S. 931, involved a cotton compress establishment, located in a city of over: 30,000 persons, and drawing a substantial percentage of its cotton from distances of more than 50 miles in fact up to 250 miles.25 The establishment, therefore, failed to meet either the mileage or the population tests of the Administrator's definition of "area of production" (see Pet., pp. 13, 17, note 6). Under the definition both tests: must be senet (Pet., pp. 12-13). The establishment not having met the mileage test, which would appear to be a valid test in any area of production definition (see Addison x. Holly Hill-Fruit Products, 322 U.S. 607, 611: Tobin v. Traders Compress Company. 199 F. (2d) S. 11), it was unnecessary for the Court of Appeals for the Tenth Circuit also to pass upon the validity of the population test. What it said on that subject must therefore he regarded as diefum and as constituting no basis for any conflict with the decision of the Court of Appeals below.

Furthermore, the decision in the Traders Compress case is easily reconcilable on its facts with the decision below. Ct. Armour v. Wantock, 323 U.S. 126, 132-133.

^{- 25} See the District Court decision in the case: 107 F. Supp. 354. 358-359 (E. D. Okla.).

As already observed; the Traders Compress case involved a cotton compress establishment which was not only located in a city of over 30,000, but drew some of its cotton. from as far away as 250 miles. In those circumstances a definition of area of production excluding such establishment would appear reasonable. In contrast, in the instant case the town of Quincy, in which Respondents' tobacco packing plants are located, is but a small agricultural community of some 6500 (supra, pp. 5, 11; see also RE 62), and the plants draw all their tobacco from an immediately, adjacent and compact area in May's case from up to fen miles away, in King Edward's from up to thirteen miles, and in Budd's from up to thirty miles. The type 62 tobacco prepared for market in packing plants in Quincy is produced within a radius of thirty miles of Quincy (RK 87, 98, 168); and of the five million pounds of tobacco grown annually in that area, three million pounds are processed in tobacco packing plants in Oninev (RK 87). Moreover, 60 per cent of all type 62 tobacco grown in Gadsden County, Florida, where Quiney is located, is processed in tobacco packing plants in Oniney (RK 13, 88), and largely by the same employees who grow it Suma. p. 926 - Sed also the U. S. Department of Agriculture map reproduced on the following page which establishes clearly that Quincy is in the very heart of the growing area of U. S. Type No. 62 tobacco.27. In

²⁶ More than 185 acres of type 62 tobacco, producing substantial quantities of tobacco, are grown within one air-line mile of Quincy (RB 64-65).

Secretary of Agriculture for type 62 tobacco in a marketing order, regulating the handling of such type tobacco pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31) is amended: 7 U.S.C. §601 et seq.). The Secretary of Agriculture defined such "production area" as meaning those counties bordering the Georgia-Florida state line and lying between the Suwance River on the east and the Flint and Apalachicola Rivers

the light of these facts, as the Court below correctly observed.

"It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case" (RK 172, note 7).

- 2. In the Holly Hill case, 322 U.S. 607, this Court concluded that Congress, in conferring power upon the Administrator to define area of production
 - "... restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him" (322 U.S. 607, 619).

As pointed out by Judge Pickett, dissenting in the Traders Compress case (199 F.(2d) at 12), this means that the Administrator may take into consideration "all relevant economic factors" necessary to determine the geographic lines of the area of production. But if a plant is within the geographic lines established, as Respondents' plants here are, supra, p. 27, no reasonable basis exists for discriminating against those of such plants are located in a town with a population of 2500 or more. As also pointed out by Judge Pickett, supra, generally the population of a city or town has no reasonable relation

on the west: 17 Fed. Reg. 3509; see also 17 Fed. Reg. 3501 and 3502 (April 19, 1952). Gadsden County i Florida is but one of such counties.

²⁸ It should also be noted that the Administrator himself has reported to Congress with respect to the area of production exemption:

[&]quot;This provision, especially as now defined in accordance with the opinion of the Supreme Court in the case of Addison et al. v. Helly Hill Fruit Products, Inc. (322 U.S. 607), results necessarily in economic discrimination and in competitive inequalities which not only make the provision very difficult to administer but are basically unfair."

Hearings on S. 49 and other bills, Sen. Comm on Labor & Public Welfare, 80th Cong. 2d Sess., p. 82.



Map reproduced from Statistical Bulletin No. 157, U. S. Dept. of Agriculture, Annual Report on Tobacco Statistics, 1954, p. 8.

to the question of whether a plant is located within an area of production.

that the primary purpose of Section 13(a)(10) was to prevent discrimination against the small farmer. Maneja v. Waiaha Agricultural Company, 349 U.S. at 268. The Court below also found that many small farmers in the Quincy area grow only up to 25 acres of type 62 tobacco per year. And this is insufficient for them to process their own tobacco; accordingly, they have it prepared for market by an independent company, e.g. Budd. (RB 251, 61-62). Clearly, this is precisely the type of case to which Congress intended to accord an exemption under Section 13(a)(10). See "4" below.

4. The legislative history of Section 13(a)(10) fully supports the conclusion that the population limitation in the Administrator's definition of "area of production" is invalid, at least as applied to the facts here.

The debates in the Senate where the provision embodying this exemption originated (81 Cong. Rec. 7656, 7876). confirm that the major reason underlying the exemption was to protect the small farmer unable to do the work of preparing his own crops for market and who would have to bear the cost of operations covered by the Act, unless such operation's were exempt. 81 Cong. Rec. 7656-7660, 7876, 7877, 7880. The debates in the House were quite similar. 82 Cong. Rec. 1784; S3 Cong. Rec. 7325, 7326, 7401, 7402, 7405, 7407-7408. The imposition of a population test in the circumstances here seems plainly to thwart the Congressional purpose. In any event Senator Schwellembach, the sponsor of the exemption, specifically recognized that the world's largest apple packing plant, located in the preduction area, would be exempt under his amendment, even though it was in the town of Winchester, Virginia, which had a population of over 10,000 according to the 1930' U.S. Census and over: 12,000 according to

the 1940 Census. Si Cong. Rec. 7877. So too a town like Quincy with a population of only some 6500 (RK 18) may not be excluded from the "area of production" simply because of its size.

The House debates evidence some concern that plants, located in large cities and in industrial and urban centers should not enjoy the exemption, and there should be a labor differential between the large city and the little town. 83 Cong. Rec. 7401, 7402. But an agricultural community, such as Quincy, Florida, which is neither a large city nor an urban or industrial center (RK 17-18, RB 62); was plainly not intended to be outside the purview of the exemption.

Pertinent portions of the Congressional debates on the "area of production" exemption are set forth in the Appendix pp. 32-38, infra.

5. Petitioner places reliance upon the various hearings and conferences held by the Administrator before promulgation of the present area of production regulations (Pet., p. 12). Petitioner admits, however, that its records do not show that any of the producers of type 62 tobacco appeared at any hearing; that any evidence was taken pertaining to the growing of such tobacco; or that the Administrator had any evidence specifically in connection with type 62 tobacco (RB 88).29

The Court below correctly held (RK 174, note 10) that Petitioner was not exitled to an injunction until he issued a valid definition of "area of production" excluding Respondents' plants. Walling v. McCracken County Peach Growers Ass'n., 50 F. Supp. 900, 905-906 (W.D. Ky.); Messenger v. Traders Compress Co., 107 F. Supp. 354, 361 (E. D. Okla.) rev'd on other grounds sub nom. Tobin v. Traders Compress Company, 199 F.(2d) 8. (C.C.A. 10). We do not understand Petitioner to contend to the contrary if the definition is invalid; his argument is that the "area of production" definition is valid.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writs prayed should be denied.30

Respectfully submitted,

MILTON C. DENBO 1625 K Street, N. W. Washington 6, D. C. Attorney for Respondents

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Respondents submit that the Court below correctly reversed the judgments of the District Court and awarded judgment to them. But if this Court regards the Record as inadequate to support such ruling of the Court below, it should not in any case review the decision below on the merits, but simply remand the cases to the District Court with instructions that the said Court decide such cases only after full and complete trial of the issues. rather than on motions for summary judgment. Sartor V. Arkansas Natural Gas Corp., 321 U.S. 620, 627; Kennedy V. Silas Masono Co., 334. U.S. 249, 256-257. Walling v. Fairmont Creamery, 139 F. (2d) 318, 322 (C.C.A. 8). Petitioner himself took this view in opposing King Edward's first motion for summary judgment, supra, p. 11. As Petitioner has in effect conceded (RK 20), the a egations in Respondents' answers and affidavits (RK 7-8, 70-71, 85-86, 117-119; RB 58 et seq.) and Petitioner's admissions (RB 83-90, 100-101) raise sufficient question as to the application of the exemptions here involved to Respondents' packing plants that at the very least Respondents are entitled to a full trial of the issues. National Metropolitan Bank v. U.S. 323 U.S. 454, 456-457; Mitchell v. Pilgrim Holiness Church Corp., 210 F. (2d.) 878, 881 (C.C.A. 7), cert. den., 347 U.S. 1013. It is immaterial that, at the District Court's insistence (RK 100, 135), Respondents also moved for summary judgment. Walling v. Richmond Screw Anchor Co., 154 F. (24) 780, 784 (C.C.A. 2) cert. den. 328 U.S. 870.

APPENDIX

Legislative History of Section 13(a)(10) of Fair Labor Standards Act.

1. Area of Production concept introduced by Senator Copeland.

In debate on the floor of the Senate, Senator Copeland read a telegram from the International Apple Association urging that there be exempted the operations of

"preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities:" 81 Cong. Rec. 7656

2. Debates on Senator Schwellenback; area of production" amendment which was adopted in the Senate.

"Mr. Schwellenbach. . . . If we leave the hill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in a cooperative warehouse, and there have the same processes performed." SI Cong. Rec. 7659.

"But it seems that, so long as they remain in their natural state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered logether in a cooperative, or turned over to a central warehouse, they should be exempt, because of the fact that if we do not exempt them, we are giving the large producer and I am certain it is not the purpose of the bill and is not within the economic theory of the bill to give the large producer, an advantage over the small producer." (Emphasis supplied). 81 Cong. Rec. 7660.

"Mr. Schwellenbach. The amendment is very strictly drawn in an effort to limit the operations defined therein purely to those of an agricultural nature. . . . In other words, in a small apple operation. of 5 or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the. ranch the necessary machinery which is required in the washing operation under the rules and regulations of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing. the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing bouse, and have these operations, which are purely agricultural operations, performed elsewhere than at the same of the ranch or the farm.

The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer."— (Emphasis supplied). 81 Cong. Rec.

7876. .

"In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the

bill." 81 Cong. Rec. 7877. . . .

The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pass the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to have his own warehouse and cannot afford to have his own washing machine, to be placed upon a pakily with the larger producers, who can afford to main tain their own warehouses and their own washing machines and their own equipment. (Emphasis supplied). SI Cong. Rec. 7877.

"Mr. Connally. Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territory? There is no limit. The condition is that they are packing plants and if they are, they are exempt.

"Mr. Schwellenbach. If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it

would be exempt.

"Mr. Connally. My understanding is that the largest apple-packing plant in the world is located at Winchester, Va., right in the heart of a great apple-producing region. That would be exempt, would it not?

"Mr. Schwellenbach. If the work done in that plant is as described in the amendment, it would be exempt."

(Emphasis supplied). 81 Cong. Rec. 7877.

3. Debates in House on Lea-Lucas amendment, broadening Senator Schwellenbach's amendment to cover all "agricultural commodities" and not only "fresh fruits and vegetables".

"Mr. Lea. Mr. Chairman, Subsection (20) grants an exemption to labor engaged in preparing, packing or storing fresh fruits and vegetables within the area of production. This amendment is necessary to give to the fruit industry, and agriculture generally, that exemption that has been promised and which is clearly within the purpose of the bill. The defect in Subsection (20), as it stands, is that it is confined to fresh fruits and vegetables and omits all other farm products equally entitled to the exemption. Part of the farmer's labor should not be in the bill and the same laborers exempted when performing other agricultural labor.

"Mr. Keller. Fresh or not fresh?

"Mr. Lea. Fresh or not fresh.

"Mr. Keller. That is what I am asking the gentleman.

"Mr. Lea. The section is confined to fresh fruits and vegetables and omits to give similar exemptions to all other products. Mr. Chairman, I am agréeable

to the substitute of the gentleman from Illinois (Mr. Lucas), which would include agricultural commodities and relieve the section of the unfair discrimination it now contains.

"Mr. Keller. What does that mean?

"Mr. Lea. Ordinary agricultural commodities of the farm:

"Mr. Keller. What does the gentleman mean by

that?

"Mr. Lea. The exemptions of this section are confined to preparing, storing, and packing in the area of

production. . . .

'Mr. Lucas. This amendment merely provides that a 'person employed in agriculture' shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural.

commodities in the raw or natural state.

"It broadens the definition and will adequately protect the farmers of my section. It exempts agriculture in all its branches and work incidental there to, including the necessary handling and preparing for market commodities when performed by the farmer or by a farmer's owned and controlled cooperative. It should be understood that it applies only to the employees in the area to be determined by the Administrator where the commodity is procluded. ..." 82 Cong. Rec. 1783, 1784

4. Definition of "employee employed in agriculture" in bill as reported by House Labor Committee at the 3d Session of the 75th Congress.

The bill as reported out by the House Labor Committee in the 75th Congress, 2d Session, broadened the definition of "employee employed in agriculture" (which contained the area of production exemption) so as to include operations upon "agricultural commodities" in their "dried state" as well as in their "raw or natural state". The exemption as reported read:

"Employee employed in agriculture' includes individuals employed within the area of production engaged in storing for the farmer, preparing (but not confinercial processing), or packing agricultural or horticultural commodities in their raw, natural or dried state, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market." (Emphasis supplied). H. Rept. No. 2182, 75th Cong., 3rd Sess., p. 2.

5. Debates on Biermann amendment, the immediate forerunner of Section 13(a)(10)

"Mr. Biermann. . . . Nearly every large farm organization in the United States has endorsed this amendment. I know of none that opposes it. It is a well-known fact that most of the cost-in most cases all of it-of running these farm factories is taken out of the amount the farmer receives for his product. ... Now why do we want farm factories exempted from the terms of this bill? Because they have to be conducted in most cases in a way very different than the way the big factory is run. . . . The employees in these farm factories are not complaining. They know the nature of their business requires elastic hoursand they know that the rigid rules laid down in this bill would not work in the farm factories. We should not disrupt these little businesses, which are handling farm products directly from the farm and which are supplying good jobs to satisfied employees. The amendment I have proposed would strengthen this bill without sanctioning substandard labor. If would save the farmers of America from an expense they should not be subject to. No good purpose would be served by including farm factories in this bill. Wage and hour legislation on a national scale is an experiment in America. Is it not wise to move. cautiously? The bill is framed with big factory conditions in mind. Why include little farm factories, where labor conditions are good? The organized farmers of America ask that this amendment be adopted. Its adoption would not weaken the bill. The bill is aimed at substandard labor conditions. ask you to exempt industries in which substandard labor conditions do not exist." 83 Cong. Rec. 7325, 7326.

"The amendment I have offered includes only the first processing of things that come off the farm. The important point is that the farmer pays the bill for this processing. Those of us who come from dairy sections know that the cost of making butter fat into butter or milk into cheese is borne by the farmer. There is no contention about that, no argument. The members from the South will agree that the man who raises the cotton pays for ginning the cotton. When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases the farmer gets just so much less, and our contention and the contention of the farm organizations is that: the bill designed to help labor should not be so worded that it puts another burden on the agricul-. ture of this country." (Emphasis supplied). Cong. Rec. 7401.

"Mr. Thompson of Illinois. May I ask the gentleman from Iowa whether his amondment would apply to a packing house located in Iowa and Illinois in the area of production, which employs 200 or 300 men?

"Mr. Biermann. Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the state of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." 83 Cong. Rec. 7401.

"Mr. Biermann. I want to read a couple of sentences from a letter I received this morning from Edward A. O'Neal, president of the Farm Bureau Federation, in which he sets out the desirability of writing into this bill definitions such as proposed in my amendment. He states: 'We believe the bill should be clarified so as to assure the exemption of employees in such agriculture and horticulture industries in rural areas.' That is all my amendment takes in He states further, as follows: 'Failure to exempt these operations when performed in rural areas where conditions are so greatly different from the situation in large industrial and urban centers, will result in increased costs of processing and handling these products which will be reflected back in

lower prices paid to farmers'." 83 Cong. Rec. 7402.

"Mr. Reilly. Does the gentleman's amendment ever a pea-canning set-up that is situated away from the farm on which the peas are grown?

"Mr. Bierman. In a little town?".
"Mr. Reilly. In a little town; yes.

"Mr. Biermann. But in the farm area!

"Mr. Really. Yes.

"Mr. Biermann. Yes; it does." 83 Cong. Rec.

7402.

"Mr. Gilchrist. The amendment provides that out in the open country, where the handling, packing, or storing of agricultural commodities is done, there shall be certain exemptions from the provisions of the bill. We should have such exemptions so as to apply them to our creameries and milk producers and cheese makers. Do not destroy these farm activities. There is no question of health involved in what is done out in the open country, because the conditions there are healthful. The tempo of work out there is slower than in the cities." 83 Cong. Rec. 7405.1

See also statements by Congressman Cooley subsequent to the adoption of the Biermann amendment by the House, showing that such amendment applied to tobacco handling in preparation for market as much as to the handling of any other agricultural commodity. 83 Cong. Rec. 7428.

IN THE

Supreme Court of the United States OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Petitioner,

Joseph T. Budd, Jr., and Florence W. Budd, co-partners, doing business as J. T. Budd, Jr., and Company, Respondents.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Petitioner

KING EDWARD TOBACCO COMPANY OF FLORIDA AND MAY TOBACCO COMPANY, Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS J. T. BUDD, JR., AND COMPANY AND KING EDWARD TOBACCO COMPANY OF FLORIDA

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INDEX

	1011.
Opinions Below	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED:	2
QUESTIONS PRESENTED	2-
Counter-Statement of the Case. 1. King Edward 2. Budd 3. Background Facts 4. Proceedings Below	4 5 9 10 11
Summary of Argument	13
Argument	25
I. The Court of Appeals correctly concluded that the employees of respondent King Edward, who are engaged at its tobacco packing plant in handling and preparing for market Type 62 tobacco grown exclusively on its own farms, are remployed in agriculture within the meaning of Section 3(f) and therefore are exempt under Section 13(a)(6).	25
A. The language of the agriculture exemption exempts the work of the packing plant employees of respondent King Edward. 1. Analysis of the statutory language: 2. King Edward is a farmer. 3. The activities of the employees at King Edward's packing plant are within the plain language of the agriculture exemption. B. The legislative history of Sections 13(a) (6) and 3(f) also shows that the work of	26 26 27 29
King Edward's packing plant employees is exempt thereunder 1. Senate proceedings 2. House proceedings 3. Conference report and debates thereon 4: Conclusion on legislative intent	30 30 38 38 38 38

・・・・・・・・・・・・・・・・・・・・・・・・・・・・・・・・・・・・	PAGE
C. Related exemptions for agricultural processors emphasize the far-reaching charac-	41
ter of the agriculture exemption	00.
D. The decided cases sustain the exemption of King Edward under Sections 3(f) and 13 (a)(6)	41
I. Waialua case 2./Farmers Irrigation case	42 48
E. The published and outstanding administra- tive interpretations of the Department of Labor also support the exemption of King Edward's packing plant employees under the agriculture exemption	
F. Other errone us arguments of petitioner	55
II. The Court of Appeals correctly concluded that the employees of respondents King Edward and Budd, who handle and prepare to-bacco for market at said respondents' packing plants, are engaged in activities enumerated in Section 13(a)(10); and the Court of Appeals also correctly held that the Administra-	
tor's definition of "area of production" is invalid as applied to the facts here involved. Accordingly, the Court of Appeals corvectly reversed the District Court and ordered judgment for respondents.	1.
A. Respondents' employees at their packing plants are engaged in "handling, packing, storing, [and] drying [an] agricultural commodit[y] within the meaning of Section 13(a)(10). 1. The employees are engaged in such operations within the common and technical meanings of such terms and also within the Administrator's published and outstanding interpretations thereof. 2. The decided cases also show that the employees here involved are engaged in performing operations enumerated in	58
Section \(\frac{13}{3}(a)(10)\)	61° 63

	P
(B.	Respondents' employees at their packing plants are engaged in handling, packing, storing, and drying an agricultural commodity "for market".
	The Court of Appeals correctly concluded that the Administrator's definition of "area of production" is invalid as applied to the factual situation here to the extent that it excludes the town of Quincy, Florida; and since the respondents' employees here involved are otherwise within the Section 13 (a) (10) exemption, the Court properly ordered judgment for respondents. 1. The population requirement in the definition is an invalid non-geographic limitation as here applied. 2. The record shows that respondents packing plants are geographically within the "area of production" of Type 62 tobacco. 3. The record also shows that the population requirement has the effect of defeating the purpose underlying the "area of production" exemption. 4. The legislative history of Section 13-(a) (10) shows also that the population limitation in the "area of production" definition is invalid as here applied. (a) Senate proceedings (b) House proceedings (c) Conference report (d) Conclusion on legislative history.
ho cal pl: ees pe (a nit	the Court is unable on the present record to d the exemption of Section 13(a)(6) applicate to respondent King Edward's packing and also the employees of respondent Budd form operations enumerated in Section 13 (10), and that the area of production deficion is invalid, the actions should be resided to the District Court for trial of the ues

APPENDIX	·
A. Statutes and Regulations	95
B. Legislative history of Sections $13(a)(6)$ and $3(f)$. 98
C. Administrator's interpretations of Sections 13 (a)(6) and 3(f)	102
D. Administrator's interpretations of certain terms	
nsed in Section 13(a)(10) E. Legislative history of Section 13(a)(10)	108
CITATIONS	
Cases:	64
Addison v. Holly Hill Fruit Products, 322 U.S. 607 21,26,41,43,65,74,75,80,82,8	7.89
Armour's, Wantock, 323 U.S. 126 A	76
Arnstein v. Porter, 154 F. (2d) 464 Avrick v. Rockmont Envelope Co., 155 F. (2d) 568	92
Barber v. Gonzales, 347 U.S. 637 Begnaud v. White, 170 F.(2d) 323	60 93
Bozant v. Bank of New York, 156 F. (2d) 787	92
Bruno v. Hills Bros. Co., 7 Labor. Cases, 761,763	$\frac{3}{50}$.
Clark v. Jacksonville Compress Co., 45 F. Sulop, 43 Damutz v. Pinchbeck, 66 F. Supp. 667 and 158 F.	(*)
(2d) 882 Dofflemeyer v. NLRB, 206 F.(2d) 813	49 50
Dulánsky v. Iowa-Illinois Gus & Electric Co., 191	
F.(2d) 881 F.A.R. Liquidating Corp. v. Brownell, 209 F.(2d)	
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14.27.41 Fleming v. Farmers Peannt Co., 37 F. Supp. 628	1.48
Bleming v. Farmers Peanut Co., 128 F. (2d) 494	
62,60 Garrett Biblical Institute v. American University,	
163 F. (2d), 265. Helvering v. Hallock, 309 U.S. 106.	93
Hilton v. Sulfivan, 334.U.S. 323	82
Holt v. Barnesville Farmers Elevator Co., 145 F., (24) 2500 cert. den. 324 U.S. 858	
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	STOTE:
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161	82
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[6]468	00
Kennedy v. Silas Mason Co., 334 U.S. 249	92
Lake Wales Citrus Growers Ass'n. v. Andrews, 1 Labor Cases 118429, and 110 F.(2d) 653	74
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Lovvorn v. Miller, 215 F. (2d) 601	74
Maestre v. Cooperativa Cafeteros, C Labor Cases	
561515	62
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254 14,16,17,20,21,22,26,28,33,38,39	
41,42,45,46,47,48,53,69,71,7	9,83
Messenger v. Traders Compress Co., 107 F. Supp.	00
354	. 59
Miller Hatcheries v. Boyer, 131 F. (2d) 283 5	0,01
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(2d) 879, cert. den. 347 U.S. 1013	25
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Puerto Rico Tobacco Marketing Coop. Ass'n. v.	
McComb. 181 F. (2d) 697 52,6	
Purity Cheese Co. v. Ryser, 153 E. (2d) 88	92
Rodriquez v. Colon, 4 Labor Cases 60361	
Rogers v. Girard Trust Co., 159 F.(2d) 239	92
Sanabria v. Valiente & Co., 3 Labor Cases 152545	02
Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 Secretary of Agriculture v. United States, 350 U.S.	
M T W 1090	81
, 24 LW 4039 Skidmore v. Swift, 323 U.S. 13455	54
Staden v Cattan Producers Assis 117 F. Supp.	
517 Tobio v. Flour Mills of America, 185 F. (2d) 596 (3,73
Tolin v. Flour Mills of America, 185 F. (2d) 596 (
Takin v Tuiders Compress Co., 139 F. Cell. S. Cell.	
den 344 U.S. 909, reli'e, den 344 U.S. 931 235	9:20
real construction of the states of the state	
118 50	
U. S. v. American Trucking Associations, Inc., 310	
17.8 534	

PAGE
Welling v. Fairmont Creamery Co., 139 F. (2d) 318 92
Walling v. Halliburton Co., 331 U.S. 17 54
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Ass'n., 50 F. Supp. 900 89
Walling v. Reid, 139 F.(2d) 323.
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(2d) 780, cert. den., 328 U.S. 870.
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Wong Yang Sung v. McGrath, 339 U.S. 33. 82.
STATUTES:
Agricultural Marketing Agreement Act of 1937, as
' amended (48 Stat. 31, as amended; 7 U.S.C. §601
et. seq.). 77
Fair Labor Standards, Act of 1938, c. 676, 52 Stat.
1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C.
§201) 2,95
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123.281.
725.242.203
107
125.242.252 1 107 125.242.281 107
\$25,242.21 \$25,242.252 \$25,242.252 \$25,242.281 \$25,242.344 \$52,106
52(106)
Federal Rules of Civil Procedure, Rule 56 92. 11 Fed. Reg. 14648 80
15 Fed 1886 (290)

PAG	E
17 Fed. Reg. 3509	7
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Hearings on S. 1349, Senate Committee on Educa- tion & Labor, 79th Cong., 1st Sess. 5	
H. Rep. 1452, 75th Cong., 1st Sess. 36.8 H. Rep. 1453, 81st Cong., 1st Sess. 72.8	5
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Regulations, Part 516; Title 29, Ch. V. Code of Fed. Regs.	9
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S. Rep. 884, 75th Cong., 1st Sess. 3	
U.S. Department of Agriculture Map Showing Cigar Leaf Growing Districts of the United	
States	13
U. S. Department of Labor, Wage & Hour & Public	
Contracts Divisions, "In the Matter, of the Amendment of the Definition of Area of Produc-	
than' As Used in Sections 7(c) and 13(a)(10) of	
the Fair Labor Standards Act, as Amended",	
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52:53	
63.64 4 60.11	11
28,30,33)	-

INDEX - Continued

1.				PAGE
353 "	6.			= 58
354				28
.355 %	. *			51
359				70.
363				108
364				108
715		.4		71.
719		0		71
751			26	3,107
751-752		· · · · · · · · · · · · · · · · · · ·		1.07
752-753			నే.	2,106
754	Mile Mile			107
Webster's N	ew Internati	onal Diction	nary, oUn-	
abridged, 19		· · · · · · · · · · · · · · · · · · ·	· · · · · · · · · · · · · · · · · · ·	27.59
W. W. Garner	"The Produ	ction of Toba	cco"	6
Yearbook of		.954, U. S. 1	Department	1
of Agriculti	ire	4		50,55
7648				32
7648-7673				41
7656				52,83
7657				52,55
7658			000	52
7659				110
7976			61 00 01 111	1112
7876 7888	a		04,00,04,111	41
7877			8187116	2112
7878			OT,O1,41	25.66
7878-7880				35
7880				35
7883				35
7886			62	35
7888				1100
7927			34.100	1.101
7927-7929				41
7928	0			34
10.23.7020				101.
7947 7949				41
7949				14.81
7.957			4	1,84

Supreme Court of the United States October Term, 1955

Vo. 278

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT & LABOR, Petitioner,

V.

Joseph T. Budd, Jr., and Florence W. Budd, co-partyles, doing business as J. T. Budd, Jr., and Company,

Respondents:

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Politioner,

KING EDWARD TORACCO COMPANY OF FLORIDA AND MAY TORACCO COMPANY, Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS J. T. BUDD, JR., AND COMPANY AND KING EDWARD TOBACCO COMPANY OF FLORIDA

OPINIONS BELOW

The opinion of the District Court (RK 55, RB 145) is reported in 114 F. Susp. 865 and also in 12 WH Cases 643

Tobacco Company of Florida Cherendriter called King Edward May Tobacco Company: "RB" refers to paves of the record in Mitchell v. J. T. Budd, Jr.; and Company (hereinafter called Budd).

and 24 Labor Cases ¶67,897. The opinion of the Court of Appeals (RK 89, RB 159) is reported in 221 F (24) 406 and also in 12 WH Cases 458 and 27 Life ¶69,105.

JURISDICTION

April 15, 1955 (RK 96, RB 166). An order until August 1, 1955, the time for filing a period writ of certiorari, was entered by Mr. Justice Black on July 8, 1955 (Id.). A petition was filed on July 29, 1955 and certiorari was granted on October 17, 1955 (RK 97, • RB 167). 350 U.S. 859. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

These cases arise under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. §201 et seq.), hereinafter called "the Act". Pertinent provisions of the Act and pertinent administrative regulations involved are set forth in Appendix A, pp. 93-98, infra.

QUESTIONS PRESENTED

1. Whether the exemption from the wage and hour provisions of the Act provided by Section 13(a)(6) for "any employee employed in agriculture", as "agriculture" is defined in Section 3(f), applies to the employees of Respondent King Edward, who are engaged at its packing plant in handling and preparing for market Type 62.

The District Court also wrote a supplemental opinion which is not officially reported (RK 74, RB 152; 24 Labor Cases [68,056).

2. Whether such employees (and the employees of Respondent Budd, who operates a similar packing plan for handling and preparing for market Type 62 tobacco grown by farmers within 30 miles of such plant) perform operations enumerated in the exemption from the wage and home provisions of the Act provided by Section 13(a) (10) for "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, . . . drying, . . . of agricultural or horticultural commodities for market. . . . and if they do perform such operations, whether the Court of Appeals correctly held the Administrator's definition of the term "area of production" invalid as applied to the factual situation here presented, and correctly reversed the District Court's action in granting the injunctions re- ". quested by Petitioner.

3. If the Court finds that it is inappropriate on the present Record to affirm the summary judgments for the

Prior to May 24, 1950 the administration of the Act was in the hands of the Administrator of the Wage and Hour and Public Contracts Divisions. But effective on that date, the administration of the Act was transferred to the Secretary of Labor by virtue of Reorganization Plan. No. 6 of 1950 (15 Fed. Reg. 3174), 64 Stat. 1263, 5 U.S.C. 133 z-15. The Secretary, however, has delegated back to the Administrator almost all of his functions in the administration of the Act. 15 Fed. Reg. 3290. In view of the foregoing, references are sometimes made in this brief to administration of the Act by the Secretary, who is the Petitioner herein, and at other times to administration by the Administrator.

^{*}The Court of Appeals held the "area of production" definition invalid insofar as it excluded from the 'area of production" Respondents' tobacco packing plants solely because they are located in a town of over 2500 population; namely, Quincy, Florida, which has a population of approximately 6500 (RK 10, 92, 93, note 7; RB 162, 163, note 7).

4

Respondents entered below on the foregoing questions, whether the actions should be remanded to the District Court with instructions that they be decided only after trial of the sues.

COUNTER STATEMENT OF THE CASE

Petitioner's statement of the case (Pet. Br., pp. 3-11) is incomplete or inaccurate in many respects. Accordingly, Respondents submit the following counter-statement:

Although the District Court and the Court of Appeals each wrote only one opinion herein, two separate actions are involved: (1) an action against King Edward and May, and (2) an action against Budd. A preliminary explanation is necessary as to the different contentions of a ch-Respondent.

Respondent King Edward contends that the Court of Appeals correctly held that the employees engaged in its packing plant operations are exempt under the agriculture exemption in Section 13(a)(6) of the Act, and accordingly that it is unnecessary for this Court to consider whether such employees are also exempt, as the Court of Appeals further held, under the "area of production" exemption in Section 13(a)(10). Respondent King Edward further contends, however, that if this Court holds said employees not exempt under Section 13(a)(6), the Court of Appeals correctly held that such employees perform operations enumerated in Section 13(a)(10); that the Administrator's definition of "area of production" is invalid as applied to such operations; and that until a valid definition is made excluding Respondent's packing plant here involved from the "areasof production", Petitioner is not chtitled to an injunction against Respondent.

Respondent Budd does not claim that its packing plant / employees are exempt under Section 13(a)(6), and the

Court of Appeals did not so hold. Consequently, no question is here involved as to the application of the agriculture exemption to Budd's employees. On the other hand, Respondent Budd makes the same contention as Respondent King Edward as to Section 13(a)(10).

In view of the foregoing, certain facts as to each action here will be presented separately, in addition to background facts common to both actions.

1. King Edward

King Edward's business consists of planting, raising and harvesting eigar wrapper leaf tobacco on farms which it operates in Gadsden County, Florida, and of handling and preparing such tobacco for market at its packing plant in Quincy, Gadsden County, Florida (RK 4, 48-49), a town with a population of some 6500 (RK 10, 92).

King Edward's farms have an aggregate acreage of approximately 3800 acres, including woodland, cultivated and uncultivated lands and pasture. 892 acres are under cultivation, and of these, 206 acres are devoted to the planting, cultivating, growing and harvesting of United States type No. 62 cigar wrapper leaf tobacco (RK \$4A, 86, 92; see also RK 48-49). This type of tobacco is grown only in three counties in Florida and in two counties in Georgia adjoining two of those in Florida, and nowhere else in the world (RK 49, 55-56, 91). See map reproduced opposite page 76, published by the United States Department of Agriculture in 1954.

King Edward does not own but rather leases its farms and packing plant facilities from an affiliated company. King Edward also operates two other packing plants which are not involved in this litigation. King Edward has at no time conceded that such two other plants are subject to the Act, and the District Court's contrary finding (RK 59) is unsupported by the Record.

RK 84A refers to a "columnar chart" filed by Respondents as an exhibit with the District Court at a pre-trial conference (RK 86).

King Edward's tobacco is grown in fields on its farms under cheesecloth shade, which completely covers and encloses the fields (RK 48:49, 57, 91). The fields are highly fertilized and intensively cultivated during the growing period (RK 58, 21).

In harvesting the tobacco, as each leaf reaches a certain state of maturity, is is promptly picked by King Edward's employees and taken immediately to one of several curing barns located on the farm. There the leaf, which has a water content of 80 to 85 per cent, is strung, hung on sticks and dried, permitted to absorb moisture, and then re-dried. In this process, the water content is reduced to between 10 and 25 per cent and the leaf turns into a shade of brown. It is then taken down, packed loosely in boxes and carried to King Edward's Jacking plant here involved, located not more than thirteen miles from any of King Edward's farms. Immediate transfer from the curing barn to the packing plant is required in order to avoid any harmful stoppage or acceleration of the intra-cellular changes that are continuously taking place within the leaf (RK 49, 50, 51, 58, 91-92; see also Circular No. 249, U. S. Department of Agriculture, 1942, entitled "American Tobacco Types, Uses and Markets", p. 49).

When the tobacco arrives at the packing plant, it is piled on the floor in piles or bulks of 3500 to 4500 pounds each for fermentation, and so remains from two to four months. During this period the bulks are taken down.

Fermentation of tobacco is aging the tobacco to make it fit for human use. There are no exceptions to the rule that fermentation must take place before tobacco can be used. See excerpts from W. W. Garner, "The Production of Tobacco" (RK 22). Ma Garner is a noted plant physiologist, employed for 40 years by the United States Department of Agriculture in making scientific tobacco investigations (RK 14-15). The excerpts from his book referred to were attached as an exhibit to an affidavit offered by the Petitioner in opposition to King Edward's first motion for summary judgment, page 11, infra. The bulk method of fermentation is described in Mr. Garner's book at RK 25, et seq.

from time to time and repiled or rebulked for the purpose of aerating the leaf and preventing excess fermentation in the interior of the bulk, and to assure that the natural changes in the leaves will be as uniform as possible throughout the entire bulk (RK 49, 58, 92; see also RK 26). After the bulking, the leaves are sprayed in order to keep them soft and pliable enough for handling without breakage or injury (RK 49, 52-53). Following this operation the leaves are sorted and graded by hand and then rebulked in order to dry for a further period of from two to four months. The leaves are then baled for sale and shipment to cigar manufacturers (RK 49, 58, 92).

. As held by the Court of Appeals (RK 92, 93) and as shown by the uncontradicted facts of record (RK 35), the bulking, sorting and baling of the tobacco at the packing plant are customary and essential operations to prepare the tobacco for market. On the other hand, none of the tobacco is stemmed, cut or treated in the packing plant, and none is "processed" therein other than as previously described (RK 49, 50). Nothing in this Record supports Petitioner's assertion (Pet. Br., pp. 5, 7) that King Edward's packing plant operations' require extensive and expensive industrial equipment, and the District Court in effect found cherwise (RK 75). Also, although a bulking plant requires some equipment, the plant is not highly mechanized or industrialized, as Petitioner suggests (Br., pp. 5, 7, 40). All the employees here involved are ordinary tobacco farm laborers. See Figures 24, 42, in Circular 249, pp. 49, 84.

The entire process for treating the leaf, from the time it is first hung in the curing barn on the farm until bulk sweating in the packing plant is completed, is one continuous process of natural transformation within the leaf, necessary to assure the desired color and appearance of the leaf, and is completed without adding any external

catalyst or other chemical element or artificial stimulation (RK 50-51). The Court of Appear described the packing plant operation as the "natural heating, fermentation, and curing of this tobacco". [Emphasis applied] (RK,92). Only the temperature and humidity are regulated both at the barn and in the packing plant," in order to prevent injurious acceleration or stoppage of the gradual and continuous natural internal transformation of the leaf. Such transformation is a process of drying and exidation, accompanied by chemical changes within the leaf (RK 51)." The chemical changes commence at the curing barn and continue throughout the bulk sweating at the packing plant. There is no dividing point between those which occur at the two places (RK 51-52). The expert evidence, upon which Petitioner relies so heavily, itself shows that

"Typical tobacco fermentation is but the resumption of reactions taking place in the later stages of curing in the barn that have been temporarily suspended by the drying out of the leaf" (RK 23). See also RK 28-29.

And Circular No. 249, U. S. Department of Agriculture, p. 124, states that "The chemical changes [effected by the fermentation] represent an extension of the curing process". Petitioner is incorrect, therefore, in asserting (Pet. Br., 1997, 5, 6) that King Edward's barn operation is essentially a "drying" operation, while the packing house operation is a "fermentation" operation. In fact both are "drying" and "fermentation" operations and, as noted, together constitute one continuous process. The only reasons for moving the tobacco to the packing house from the barns are that there are insufficient barns on the farms

Atmospheric temperature is controlled to some extent in the barn, and the temperature of the bulks at the packing plant is controlled by taking down and rebuilding the bulks as previously described (RK 51).

^{*}See also RK 18-25, 26-30, describing such changes and their causes.

to store the tobacco until bulking is completed, and the natural transformation within the leaf takes longer in the barns than in the bulking operations performed in the packing plant (RK 51; see also RK 23).

King Edward employs approximately 120 employees at the height of the packing season in its packing plant here involved, and such employees are engaged in bulking, sorting, handling and baling of tobacco and shipping same to market (RK 92, 49, 4). All such tobacco is tobacco grown by King Edward on its farms, as King Edward's plant here involved does not handle tobacco grown by others (RK 4, 49); and the District Court so found (RK 59), as did the Court of Appeals (RK 92). A large majority of the employees who work in the packing plant also work on King Edward's farms, or other farms, in planting, growing, harvesting and barn-curing the tobacco (RK 63, 75-76, 84A, 86, 92-93):

The parties stipulated (RK 46-47) that (a) King Edward employs many of its employees "engaged in the handling of tobacco" in and about its place of business at Quincy, Florida, i.e., its packing plant here involved, at wage ratex less than 75 cents an hour, and (b) King Edward does not keep the records of hours worked each workday and each workweek for its said employees as prescribed by the Administrator's Regulations, Part 516, Title 29, Ch. V. Code of Federal Regulations: This stipulation, which is the only evidence as to King Edward's failure to comply with the minimum wage and record-keeping provisions of the Act, describes the employees work in terms exempt under section 13(a)(10).

2. Budd

Budd grows no tobacco but operates a packing plant in Quincy, Florida, employing 108 persons (RB 51-52, 148, 162), at which it handles and prepares for market the tobacco grown by others on their farms (RB 146, 162), all

located within a radius of 30 miles of Budd's plant (RB 34, 145-146, 161; see also RK 50). Budd's packing plant operations are essentially the same as King Edward's (RB 35, 42, 56-57, 141, 142). While the Record shows that Budd's packing plant contains equipment, that equipment, as found by the District Court (RB 148), is simply equipment needed for temperature control in the bulking operations (RB 35; see also Figures 24, 42 in Circular 249 Feferred to supra, p. 7. Budd's plant, like King Edward's, is not highly mechanized or industrialized. Budd's employees, who for the most part live on the tobacco farms all year-round, are also employed in growing the tobacco which they thereafter handle at Budd's packing plant (RB 36, 154, 162):

3. Background facts

¹ 80 per cent of the 300 farmers in the Quincy area who grow Type 62 tobacco grow less than 25 acres of such tobacco per year (RB 162). This acreage yields insufficient tobacco to enable each farmer to "bulk" his own crop, since a bulk of over 3,000 pounds of tobacco is needed for natural heating, fermentation and curing of the tobacco (Id.). Accordingly, these farmers have their tobacco prepared for market by an independent company, such as Budd (Id.; see also RB 36). On the other hand, about 70 per cent of all the tobacco grown in the Quincy area is bulked in the growers' own packing plants. The District Court found that of the 2,554 acres planted with this tobacco in the Quincy area, 1,459 are grown by companies operating packing plants in which they handle only tobacco grown by themselves, and an additional 311 acres are grown by companies which operate packing plants handling the tobacco grown on such acreage and also tobacco grown by independent farmers (RB 148).

Quincy, Florida is an agricultural community (RK 11, 50; RB 36) in which the principal source of cash income

comes from the raising of U.S. Type No. 62 tobacco (RB 36). Moreover, about 60 per cent of the income of the population of Gadsden County is estimated to be farm income (RK 10). Employment on farms in Quincy and within one mile thereof, is a substantial part of all employment in that area, and almost 50 percent of the wage earners in the area reside on farms (RK 10, 50).

Five million pounds of tobacco are grown annually in Gadsden and Leon counties, Florida, and in Decatur and Grady counties, Georgia, which adjoin (RK 55-56, 91) said counties in Florida (RK 50). Three million pounds of such tobacco are bulked in tobacco packing plants in Quincy (RK 50). Moreover, the annual production of all agricultural products in Gadsden County. Florida, including all crops, cattle and other farm products, amounts to approximately \$12,000,000. Three-fourths of this, or approximately \$9,000,000 worth, consists of Type 62 tobacco. And of this amount, 60 per cent is bulked in tobacco packing plants in Quincy (RK 7, 50).

4. Proceedings below

Based upon the complaint against it and upon its answer and supporting affidavits, King Edward moved for summary judgment (RK 6-11, 35, 57). Petitioner opposed the motion and the District Court denied it, holding that the action could not appropriately be disposed of on motion for summary judgment (RK 35-37). Subsequently, however, the District Court itself suggested that all parties file motions for summary judgment (RK 57, 86; RB 147); and when this was done (RK 47-48; RB 145), the District Court awarded summary judgment in each case to the Petitioner (RK 55-61, 77-78; RB 145-151, 155-156). Such judgment in each case consisted of an injunction

More than 185 acres, producing substantial quantities of Type 62 tobacco, are located within one air line mile of Quincy (RB 37).

restraining the particular Respondent from violating the minimum wage and record-keeping provisions of the Act (RK 77.78, RB 155-156). The District Court held that Budd's packing plant employees are clearly subject to the Act (RB 149) but it did not discuss the Section 134a) (10) exemption at all. With respect to King Edward, the District Court held that the exemption for agriculture in the Act ends when the tobacco reaches the receiving platform of the packing plant, and accordingly the packing plant employees are not exempt under the agriculture exemption (RK 60-61, 93). As for the "area of production" exemption in Section 13(a)(10) the District Court field, without assigning any reason, that such exemption also does not apply to the packing plant employees of King Edward (RK 61).

• The Court of Appeals reversed the Judgment in both cases. It held that the agriculture exemption in the Act applies to the packing plant employees of King Edward because—

"It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops, and that the work of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes 'practices performed by a farmer as an incident to or in conjunction with such farming operations, including preparation for market within the meaning of Section 203(f)" (RK 93).

The Court of Appeals also held that the Section 13(a)(10) exemption applies to the packing plant operations of both Respondents, saying—

"After such processing, this type tobacco falls into eight main classifications, and none of those classifications can be determined prior to the processing. Primarily, because it cannot be graded until it has been a processed, there is no market at an earlier stage for this type tobacco. The market variation dependent upon grading is considerable, ranging from a high of approximately \$2.40 per pound down to as low as \$.40 per pound. . . When it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the employees of all of the appellants are exempt under Section 2i3(a)(10)." (RK 92, 94-95; RB 162, 164).

The Court of Appeals further held that the Administrator exceeded his authority in excluding from the "area of production" any town of 2500 or more population, particularly as applied to the factual situation here presented (RK 93, note 7; RB 163, rate 7). It further held that the Administrator was not entitled to an injunction until he made a valid definition of "area of production", since Respondents might "likely fall with[in] a valid definition" (RK 95; RB 165).

SUMMARY OF ARGUMENT

Two separate actions are here involved, presenting questions under Section 13(a)(6) or Section 13(a)(10) of the Fair Labor Standards Act.

I

The Court of Appeals correctly concluded that King Edward's employees are "employed in agriculture" as defined in Section 3(f), and therefore exempt under Section 13(a)(b), when engaged at its tobacco packing plant in Quincy, Florida, in handling and preparing for market Type 62 tobacco grown exclusively on farms operated by King Edward within 43 miles of that plant. Respondent Budd does not grow any tobacco; the Court of Appeals did not find Budd exempt under Section 13(a)(b); and no contention is made here that the agriculture exemption applies to the employees in Budd's

packing plant in Quincy, engaged in handling and preparing for market Type 62 tobacco grown by various farmers in the locality.

The statutory definition of "agriculture" in the Act is divided into two distinct branches. The first distinct branch-the primary meaning-is "farming in all its branches", illustrated by "the cultivation and tillage of the soil" and "the production, cultivation, growing, and harvesting of any agricultural . . . commodities". The second distinct branch of the agriculture definitionthe broader meaning-includes "practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations", including "preparation for market, delivery to storage or to market or to carriers for transportation to market." Farmers Irrigation Co. v. McComb, 337 U.S. 755, 762-763. Under the statutory language, such practices are exempt if they are either incident to or in conjunction with the farming operations. This exemption "was meant to embrace the whole field of agriculture". Maneja v. Waialua Agricultural Co., 349 U.S. 254; 260.

Functionally, the activities of King Edward's employees here involved represent common, everyday activities
performed by American farmers and farms. King Edward is obviously "a farmer" within the meaning of the
agriculture exemption because it operates farms on which
it cultivates and tills the soil, producing, growing and
harvesting Type 62 shade-grown cigar wrapper tobacco,
an agricultural commodity! King Edward's employees
on its farms, when engaged in these activities, clearly
fall within the first distinct branch of the agriculture definition. After harvesting, the tobacco leaves are immediately taken to curing barns on these farms, where they
are dried, moistened, and redried. The tobacco leaves
are then transferred to the packing plant here involved,

where they are piled and repiled in "bulks" of 3500 to 4500 pounds each, under controlled temperature and humidity, to facilitate and continue the natural drying and fermentation of the tobacco, without addition of chemicals or other artificial means. The leaves are then sorted and graded by hand, rebulked, and baled for sale to cigar manufacturers. These packing plant activities of King Edward, the grower, performed exclusively upon tobacco grown upon its own farms, constitute "practices performed by a farmer . . . as an incident to or in conjunction with" the enumerated field operations of King Edward, and therefore fall within the second branch of the agriculture definition. The preparation of Type 62 tobacco, from the time it is first hung in the curing barns on the farm until the bulking is completed in the packing plant, is one continuous and integrated operation, largely performed by the same employees who grow and harvest the tobacco on King Edward's farms. uncontradicted record shows, and the Court of Appeals found, that such packing plant activities are customary and essential in preparation of the tobacco for market. Primarily because it cannot be graded until it has been bulked, there is no market at an earlier stage for Type 62 tobacco.

The legislative history of the agriculture exemption reinforces its comprehensive language. Beginning with a
broad definition of agriculture in the original bill as reported to the Senate, Congress made the exemption more
and more inclusive as the bill worked its way through
to final passage. Congress clearly expressed the legislative purpose to exempt such "processing" operations
as milk bottling, fruit packing, cotton ginning, and hog
slaughtering, when performed by the farmer upon his
own produce. Congress underscored that intention by
striking ut limiting phrases such as "ordinarily" performed by a farmer and by adding sweeping language exempting all practices performed "in conjunction with"

as well as "incident to" farming operations, whether "by a farmer" or "on a farm", down to and including "preparation for market", "delivery to storage", and "delivery ... to market or to carriers for transportation to market". By such successive amendments, the exemption "was broadened until it became coterminous with the sum of those activities necessary in the cultivation of crops, their harvesting, and 'their preparation for market, delivery to storage or to market or to carriers for transportation to market". Waialua, 349 U.S. at 260. Congress drew no distinction between large and small farmers or between hand labor and mechanized operations. Id., 349 U.S. at 261, 265.

Moreover, the exemptions in Sections 7(c) and 13(a) (10), which were granted to non-farmer processors of agricultural commodities in order to spare the farmer additional costs, emphasize the Congressional intent to exempt operations by farmers themselves, as comprehensively defined in Section 3(f), where additional costs would be even more direct.

Petitioner errs in relying upon Congressional rejection of amendments to the original bill which would have exempted tobacco auction warehouses. Only one of such amendments related to the agriculture exemption in the bill; and none of them related to farmers who, as in the case of King Edward, prepare their own crops for market. The rejected amendments concerned independent seasonal auction warehouses providing facilities for marketing of non-cigar leaf tobacco after it is cured and graded on the farm. The Type 62 tobacco here involved is not sold through auction warehouses, and it cannot be, and is not, marketed until after it is bulked and graded in the packing plant. Furthermore, the purchaser of the non-cigar tobacco at the auction warehouse, commonly a manufacturer, transports the tobacco to his redrying plant, where it is sorted and run through a redrying machine which conditions it for packing in hogsheads. The natural fermentation process in the case of non-cigar tobacco takes place primarily after the tobacco has been redried, whereas the fermentation of Type 62 tobacco in the packing plant is merely an extension of the barncuring process, and is essential for the purpose of grading such tobacco for market.

Petitioner derives sweeping and wholly unfounded conclusions about the scope of Section 13(a)(6) from certain dicta in Waialua (349 U.S. at 267-268) concerning the omission of sugar milling from the exempt operations enumerated in Section 13(a)(10). First, the tobacco packing operation here involved is definitely embraced in Section 13(a)(10), since it constitutes "handling, packing, storing . . . [and] drying . . . [an] agricultural . . . commodit[y] . . . for market", within the meaning of that exemption. Second, the sugar milling involved in Waialua was recognized as a borderline case, the opinion confirming that "all other forms of quasiindustrial processing-ginning, canning, packing sete." are enumerated in Section 13(a)(10) and unquestionably fall within the agriculture exemption when performed by a farmer upon his own produce. Third, the Administrator has recognized in this record (RB 51) and in testimony before Congress as late as 1949 that the allembracing agriculture exemption does not depend upon the exemptions granted in Section 13(a)(10) to independent operators. Fourth, King Edward's packing operations are a normal incident to the cultivation of Type 62 tobacco, since 70 per cent of all such tobacco grown in the Quincy area is prepared for market in packing plants operated by the growers.

Finally, King Edward satisfies practically all the standards enumerated in Waialua for determining the applicability of the agriculture exemption. King Edward's growing operations are substantial and not a mere facade

for an otherwise industrial operation. The product resulting from the packing operation is fermented tobacco, an agricultural commodity. The fermentation of tobacco is not a transformation by manufacturing, as in the milling of sugar cane into raw sugar and molasses. The same employees work on King Edward's farms and in its packing plant. These employees are not typical factory workers, but rather unskilled farm laborers, largely engaged in manual work in the packing plant.

The original administrative interpretations issued by the U.S. Department of Labor after enactment of the Act uphold the exemption of King Edward's packing plant employees under Section 13(a)(6). Such interpretations, which specifically included in the exemption "handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing" tobacco, have never been changed by re-publication or by press release or any other means bringing the change to the attention of employers, employees and the general public. Such interpretations were in effect on the date of the 1949 amendments to the Act. Accordingly, Petitioner has no support in such amendments or otherwise for overturning an interpretation of almost seventeen years' standing, upon which farmers have regulated their affairs. It is doubtful whether the Secretary of Labor would have attempted such change of interpretation except at the urging of the District Court below.

П.

The Court of Appeals correctly held that the employees of both King Edward and Budd perform operations enumerated in Section 13(a)(10); that the Administrator's definition of "area of production" thereunder is unauthorized by Congress as applied to such opera-

tions in Quiney, Florida; and that Petitioner accordingly is not entitled to an injunction against either Respondent.

Respondents' packing plant employees are "handling, packing, storings . . . [and] drying . . . [an] agricultural . . . commodit|y|'', namely Type 62 tobacco, within the common and technical meaning of such terms in Section 13(a)(10). Petitioner stipulated that the employees involved are engaged in "handling" tobacco. The uncontradicted facts of record confirm that the employees are engaged in bulking, shaking, sorting, separating, grading, tying and baling of tobacco, all activities embraced in the operations enumerated in Section 13(a) (10). Moreover, the bulking operations as a whole constitute a gradual and continuous process of drying and oxidation likewise embraced in Section 13(a)(10). The phrase "in their raw or natural state" in Section 13(a) (10) concededly, and as shown plainly by the legislative history, qualifies only the operation "preparing" in Section 13(a)(10), rather than the operations of "handling", "packing", "storing" and "drying". In any case the fermentation of tobacco in bulk-sweating is properly classified as an operation upon tobacco in the "raw or natural state", since it involves no cooking or artificial means or addition of extraneous materials. The natural chemical changes occurring in the leaf are akin to those in the ripening of fruit. The operations involved here on tobacco are as plainly embraced in the exemption as the: ginning, compressing or canning of other agricultural commodities there enumerated, and are far less mechanized. The employees here involved are ordinary farm laborers doing largely unskilled manual work in the packing plants. In no circumstances can such plants be likened to factory-type, industrialized operations such as sugar milling which this Court discussed in Waialua.

These interpretations are sustained by numerous decisions in the lower Federal courts, and are substantiated

by the legislative history of the area of production exemption. Congress began with a narrow exemption for preparation, packing and storing of fresh fruits and vegetables in their raw or natural state; broadened fire exemption to include these operations upon all agricultural commodities in their raw, natural or dried state; and ultimately enlarged the exemption under the Biermann amendment to encompass all the operations now included in Section 13(a)(10), including "the first processing of things that come off the farm", as explained by the sponsor, and including many operations other than "preparing in their raw or natural state". The omission of the term "processing" from Section 13(a) (10) was intended only to exclude purely manufacturing operations such as textile production or sugar milling, but did not preclude exemption thereunder of "all other forms of quasi-industrial processing" as explained in Waialua, 349 U.S. at 268. The Administrator has repeatedly recognized that the scope of Section 13(a)(10) overlaps that of Section 7(c).

Petitioner erroneously relies upon Congress' rejection of amendments to exempt tobacco auction warehouses. In the Senate the amendment offered did not relate to Section 13(a)(10); and in the House the amendment on this subject was offered only after the Biermann amendment had already been adopted. And in any event, as already explained, the operations of tobacco auction warehouses, to which the amendments related, differ both legally and functionally from the bulking operations here presented.

The original administrative interpretations of Section 13(a)(10) exempted the drying, packing and handling for market here involved. Such interpretations were not questioned in Congressional testimony by the Department of Labor as late as 1948, and in the Administrator's An-

nual Report filed in January 1949. Chike the situation concerning sugar milling (Waialaa, 349 U.S. at 269 270), no supposedly changed interpretation of Section 13(a)(10) in this regard was subsequently reported to Congress by the Administrator prior to enactment of the 1949 amendments. Moreover, Congress' review of the Act in 1949 touched Section 13(a)(10) only as to definition of the area of production rather than the scope of exempt activities. At worst, the outstanding and published interpretations at the time indicated doubt as to tobacco bulking operations, so that Congress can hardly have "ratified" the alleged change relied upon by the Administrator.

The packing plant operations here involved further satisfy the requirements of Section 13(a)(10) that they be performed upon an agricultural commodity "for market". Bulking is an essential pre-requisite to the marketing of Type 62 tobacco.

Respondents King Edward and Budd, who draw the tobacco bulked in their plant's from areas 13 and 30 miles from their respective plants, satisfy the Administrator's definition of "area of production" under Section 13(a)(19) in regard to mileage distance from the surrounding farms. They do not meet the Administrator's added "population". test, which excludes the town of Quincy because its population exceeds 2500. Section 13(a)(10) restricts the Administrator, "to the drawing of geographic lines". Addison v. Holly Hill Fruit Products, 322 U.S. 607, 619. The 2500 population limitation, as here applied, is a non-geographic limitation not authorized by Congress. The record shows beyond question that Respondents' packing plants are within any rational definition of geographic lines describing the "area of production" of Type 62 tobacco. The town of Quincy is a small agricultural community of 6500 population. About 60 per cent of the Type 62 tobacco grown within 30 miles of Quincy is packed therein, largely by the same employees who grow it. This small compact

area around Quincy is the only locality in the United States where Type 62 tobacco is grown. The principal source of eash income in Quincy is the raising of Type 62 tobacco, and about 60 per cent of the income of Gadsden County, where Quincy is located, derives from agriculture. Almost 50 per cent of We wage earners in the area actually reside on the farms. Quincy is thus in the very heart of the area of production of Type 62 tobacco (See Map opposite p. 76, infra). Its retall stores, service establishments and public facilities are necessary to serve the requirements of the 4636 employees in the tobacco packing plants in the Quincy area. The undisputed facts of record thus disclose the necessity for discarding the inflexible 2500 population test herein, just as the Administrator's regulation recognizes in other respects different mileage limitations for different commodities and operations and varying distances around the periphery of cities and other places with varying populations.

The great majority of the small farmers in the Quincy area grow less than 25 acres of Type 62 tobacco per year, an amount which is insufficient to be bulked by natural processes in a packing plant. The independently-operated packing plant is thus essential to enable the small farmer to equalize his position with that of the large grower who can afford to operate a packing plant for his own crops. Wajalua, 349 U.S. at 268. This is precisely the type of case that Congress had in mind in writing the area of production exemption. While stressing the disparities between packing plants in different circuits (Pet. Cert. 14-15). Petitioner ignores the disastrons situation that would : be created within Quincy, where the farmer-operated packing plant is exempt under Section 13(a)(6), if the independent packer serving numerous small farmers in the area were not exempt under Section 13(a)(10). In avoiding error under one exemption, the District Court erred under the other. The Court of Appeals properly construed

8

each exemption in the only way possible to effectuate the Congressional mandate as to both.

By avoiding any population test in the original area of production definition established in 1938, and in the regulation as in effect from 1941 to 1947, the Administrator himself recognized that the purpose of Section 13(a)(10) does not compel the inclusion of such population limitation. Indeed when such limitation was imposed for a brief period in 1939-1940, the Administrator dropped it from the regulation confessedly because it resulted in numerous inequalities and economic discriminations between establishments located in the area of production as so defined and those outside that area.

The legislative history of Section 13(a)(10) confirms our contention in this regard. Quincy is not an urban industrial center/intended to be excluded from the exemption, regardless of the merit of a 2500 population test in distinguishing between rural and urban areas for census, statistical and perhaps other purposes. Rather, Quincy is the type of small rural community which Congress designedly sought to exempt if within the geographical area. Exemption of packing plants in Quincy is entirely in line with the Congressional purpose to establish labor. differentials between the large city and the little town. Inclusion of Quincy in the area of production of Type 62 tobacco would exempt fewer than 1600 employees. Obviously distinguishable is Tobin v. Traders Compress Co., 199 F. (2d) S, cert. den, 344 U.S. 909, involving a cotton compress establishment located in a city with population exceeding 30,000, and drawing a substantial percentage of its cotton from distances up to 250 miles away. The Administrator obviously did not consider the merit of the claims of King Edward, Budd, and other tobacco packing plants in Quincy with reference to their being within the "area of production", since he erroneously regarded the operations of such packing plants as not being among. those enumerated in Section 13(a)(10).

Petitioner errs in asserting that Congress ratified the Administrator's "area of production" definition by adopting the 1949 Amendments to the Act without changing Section 13(a)(10). The legislative history of such Amendments establishes that there was no such ratification. And in any case the statutory language and purpose were so plain that failure to amend in 1949 cannot constitute adoption of the administrative definition.

Ш.

If the Court finds that it is inappropriate on the present record to affirm the summary judgments for the Respondents/entered below, the actions should be remanded to the District Court with instructions to proceed to trial of the issues. Petitioner himself stressed before the District Court that there were serious and genuine issues on many material facts; such as whether King Edward is a farmer, whether its packing plant operations are incident to or in conjunction with its farming operations, and whether the · packing plant employees perform operations enumerated in Section 13(a)(10). The Administrator's population test is so decidedly at variance with the Congressional purpose that a substantial factual showing would be required. to uphold its validity as applied to Respondents' operations in Quincy. Petitioner's contentions below in effect concede that the record raises sufficient questions to entitle these Respondents to trial of the issues before an injunction may issue against them.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CON-CLUDED THAT THE EMPLOYEES OF RESPONDENT KING EDWARD, WHO ARE ENGAGED AT ITS TO-BACCO PACKING PLANT IN HANDLING AND PRE-PARING FOR MARKET TYPE 62 TOBACCO GROWN EXCLUSIVELY ON ITS OWN FARMS, ARE "EM-PLOYED IN AGRICULTURE" WITHIN THE MEAN-ING OF SECTION 3(f) AND THEREFORE ARE EXEMPT UNDER SECTION 13(a)(6).

King Edward is engaged in a single enterprise—growing Type 62 tobacco and preparing it for market. The activities of its packing plant employees are an essential and integral part of that enterprise (RK 48-53, 57-58, 91-92, 93).

King Edward's activity in preparing its tobacco for market is similar to the activity conducted by large numbers of wheat farmers, cotton farmers, and fruit and vegetable farmers, among many others in the United States, in preparing their crops for market. All such activities are common everyday activities performed by most American farmers. A denial of the exemption to King Edward's activity in preparing its tobacco for market would equally deprive all American farmers of the exemption the Act now grants for preparing their crops for market, whatever such crops might be. See Briefs

See NLRB v. Campbell, 159 F. (2d) 184, 187. (C.C.A. 5) where the Court said in holding exempt as "agricultural laborers", under the National Labor Relations Act, employees engaged in packing and preparing for market tomatoes grown by their employer on his farm:

[&]quot;Congress, as well as this Court, has recognized that the packing and preparing of agricultural products for the market is a necessary incident to any agricultural operation, for no farmer, dependent upon that which he produces to sustain his

for American Farm Bureau Federation and National Grange et al., amici curiae herein.

We submit that the language and legislative history of the exemption, as well as the controlling case law and the published and cutstanding administrative interpretations, all show that the work of the employees here in question falls within the exemption.

A. THE LANGUAGE OF THE AGRICULTURE EXEMPTION EXEMPTS THE WORK OF THE PACKING PLANT EMPLOYEES OF RESPONDENT KING EDWARD.

1. Analysis of the statutory language.

This Court has said that "employment in agriculture is probably the most far-reaching" of the exemptions in the Act, Addison v. Holly Hill Fruit Products, 322 U.S. 607, 612, and that the agriculture "exemption was meant to embrace the whole field of agriculture". Maneja v. Waialua Agricultural Company, 349 U.S. 254, 260.

The statutory definition of agriculture (Section 3(f)) is divided into two distinct branches. The first distinct branch—the primary meaning—is "farming in all its branches and among other things includes the cultivation and tillage of the soil, . . . the production, cultivation, growing, and harvesting of any agricultural . . . commodi-

operations, could long exist if he could not market that which he produces, and so long as the operation of washing, packing and preparing for market by the employees of a farmer is on that only which he has produced on his farm, it is a necessary inclient to farming and is agricultural labor. . . So long as these undertakings are in the preparation and packing by him for the market of that which he has grown on his farm, the labor necessary thereto is agricultural labor" [Emphasis supplied].

U.S. 755 at 762. The second distinct branch of the statutory definition of "agriculture"—the broader meaning includes "practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". This part of the definition embraces "practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm". Id., 337 U.S. at 763. [Emphasis supplied]. Under the language of the exemption, it will be noted, such practices are exempt, if they are either incident to or in conjunction with 12 the farming operations; they do not have to be both.

Under the carefully drafted statutory language, the exemption thus starts with the growing of the agricultural commodity, continues with its cultivation and harvesting, includes its preparation for market or delivery to storage, and ends only after the farmer has delivered it to market or for transportation to market.

2. King Edward is a farmer.

The Court of Appeals correctly concluded that King Edward is a "farmer" within the sense used in Section 3(f) since it conducts the farming operations enumerated in the statutory definition of producing, cultivating, growing and harvesting tobacco (RK 93). Moreover, the packing house activities of the employees involved here are integrated and coordinated with and an indispensable part of King Edward's operations of producing, cultivating, growing and harvesting tobacco. Supra, pp. 5-9.

¹² The term "incident" is defined in Webster's New International Dictionary, Unabridged Version 1955 ed., p. 1257, as meaning "appertaining to", "directly and immediately pert. to, or involved in something else". "Conjunction" is defined as "association", "occurrence together". Id., p. 565.

Petitioner's repeated references to King Edward's offthe-farm bulking operations (Pet. Br., pp. 2, 18, 50) imply that King Edward's packing operations are not within the exemption because they take place off the farm. But this overlooks the fact that the agriculture exemption includes all activities performed "by a farmer", whether or not performed "on-a farm". And the Administrator himself has consistently taken the position that all incidental and conjunctive practices, if performed by a farmer, are exempt, and in that situation, "it makes no difference whether they are performed on or off the farm". Interpretative. Bulletin No. 14, U. S. Department of Labor, issued August, 1939, ¶10, WHM 35:351, 354. This Court in Maneja v. Waialua Agricultural Company, 349 U.S. 254, 261, held exempt a farmer's incidental activities, such as "delivery to storage or to market or to carriers for transportation to market", even though performed off the farm,13

Petitioner's main argument; however, is that the agriculture exemption does not apply to tobacco bulking, when done by the farmer, whether he does it on or off the farm. In this connection, it will be noted that of the 15 tobacco packing plants in the Quincy area (RK 57, 84A, 86), three are located directly on tobacco farms. Two of these, namely those of American Sumatra Tobacco Corporation and of H. E. Carry, pack only the tobacco they grow themselves (id.). Petitioner's argument would deny the agriculture exemption even to such packing plants.

¹³ Equally irrelevant is the fact that King Edward leases its farms and packing plant facilities from an affiliated company. The Administrator has ruled that where a packing house operator leases a farm and then proceeds to operate the farm, planting, growing and harvesting crops and then packing such crops, the agriculture exemption applies to the employees engaged in the said packing operations. See opinion reported at WHM 35:751 and set forth in Appendix C. p. 107; infra.

3.. The activities of the amployees at King Edward's packing plant are within the plain language of the agriculture exemption.

Contrary to Petitioner's assertion (Pet. Br., pp. 53-54, note 20), the undisputed facts of record show (RK 25, 35, 50-51) that the activities of the packing plant employees in bulking, sorting and baling the tobacco were customary and essential operations to prepare King Edward's tobacco for market. The Court of Appeals also found that until the bulking operation is completed. Type 62 tobacco cannot be graded and consequently "there is no market at an earlier stage for this type tobacco"; and that the packing plant operations are "essential for the marketing of [the farmers'] crops" (RK 92, 93). The undisputed facts further, show that the preparation of Type 62 tobacco, from the time it is first hung in the curing barns on the farm until the bulking is completed in the packing plant, is one continuous and integrated process, largely performed by the same employees who grow and harvest, the tobacco on King Edward's farms. Supra, pp. 6, 7-9 (RK 50-51, 51-52).4 Moreover, King Edward's packing plant here involved handles only the tobacco grown by itself on its own farms (RK 59, 92).

The record does not substantiate Petitioner's inference that "Type 62 tobacco not only can be, but often is, marketed by the farmer in an uncured state prior to bulking" (Pet. Br., p. 54 note 20). In King Edward's other two plants which bulk tobacco purchased from farmers, the purchase price is customarily established according to grades after bulking.

¹⁴ Since the process is one continuous and integrated one, no basis exists for Petitioner's assertion (Pet. Br., p. 54, note 21) that the sugar milling involved in Waighta was "much closer in both time and sequence to the actual farming; than is the tobacco bulking in the instant case". As Petitioner admits (Pet. Br., p. 4), as soon as the tobacco is picked in the field it is taken immediately to a curing barn where it is strung on sticks and hung to dry. This is the beginning of the single continuous process which ends in fermented tobacco and is comparable to the activity in Waialua of immediately conveying the freshly cut cane to the sugar mill.

In the light of these facts, King Edward's packing plant activities are clearly exempt as "practices... performed by a farmer... incident to or in conjunction" with farming. Surely, if the words "preparation for market" are to be given any meaning with respect to farming of Type 62 tobacco, they plainly embrace such packing plant activities.

Petitioner asserts that the agriculture exemption is inapplicable here because the term "practices", as used in Section 3(f), suggests only activities "ordinarily" carried on by farmers with their "ordinary" farming (Pet. Br., pp. 52-53). But this argument cannot be reconciled with the fact that the statutory language itself, in giving examples of exempt "practices", lists "preparation for market"—the very practice in issue liere. That is, Congress specifically exempted the activities involved here, namely "preparation for market", when performed by a farmer.

B. THE LEGISLATIVE HISTORY OF SECTIONS 13(a) (6) AND 3(f) ALSO SHOWS THAT THE WORK OF KING EDWARD'S PACKING PLANT EMPLOYEES IS EXEMPT THEREUNDER.

The comprehensive character of the "agriculture" exemption is fully borne out by its legislative nistory.

1 Senate proceedings.

S. 2475,15 which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. As the bill was introduced; agricultural laborers

The bills in their various forms—as introduced, as reported, etc.—referred to in this discussion of the legislative history are collected in 'Senate Bills, 75th Cong., 1937-38, Vol. 13, 2401-2550, J-50-2d Set" (Library of Congress).

were exempt (2(a)(7)), but there was no definition of the term "agricultural laborer".

The Senate Committee on Education and Labor, to which the bill was referred, rewrote the agricultural exemption. The Committee bill exempted "any person employed in agriculture" without limitation; and the Committee wrote into the bill its own comprehensive definition, of "agriculture" as including

"... farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in sub-division (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and any practices ordinarily performed by a farmer as an incident to such farming operations" [Emphasis supplied].

See S. 2475 as reported in the Senate July 6, 1937, §2(a) (7), Calendar No. 905, 75th Cong., 1st Sess., pp. 50-51.

Contrary to Petitioner's contention (Pet. Br., p. 53), the Committee Report stressed the exemption of "processing" operations under the broad definition of "agriculture", declaring that the reported bill excluded—

"persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations" (S. Rep. 884, 75th Cong., 1st Sess., p. 6). [Emphasis supplied.]

Senator Black, chairman of the Senate Committee in charge of the bill, stated that it—

"specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal. "We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition, to that we have drawn liberally from Mr. Webster's definition of agriculture." S1 Cong. Rec. 7648. [Emphasis supplied.]

In debate, Senator Pope asked if "dairying" would include "the farmer who bottles his own milk and cream and sells it . . . even though he might do it in considerable quantity". Senator Black answered, "Unquestionably", and further, "I have no doubt that a dairy farmer who bottles his own milk is still a dairy farmer. The fact that he bottles it would not change his characteristics from that of a farmer." SI Cong. Rec. 7656.

Senator Black also commented that while the Committee was not in favor of exempting the packing business as it related to many agricultural products, "the farmer or the apple grower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming neighbors . ." [Emphasis supplied.] Id., p. 7657.16

Thereafter Senator Schwellenbach made the following statement:

"When an apple grower picks his apples and takes them into his own warehouse ... and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is no dispute about the fact that it is an agricultural operation It seems to me that the bill, under the definitions as they now stand, places at a considerable

Senator Copeland later questioned Senator Black on the packing by a farmer of his own apples, his placing them in a storage house, and his subsequent transportation of the apples to market. Senator Black stated that such operations would be exempt. He drew an analogy between such operations and those of a farmer raising watermelons who packs his fruit in crates and then takes them to town to sell them either to a broker or from house to house. All such operations, he stated, would be exempt. 81 Cong. Rec. 7658:

disadvantage the man who is too small an operator to perform these operations upon his own farm. The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes. [Emphasis supplied]. SI Cong. Rec. 7659.

Senator Schwellenbach's unchallenged Statement is particularly significant. It shows recognition by the Senate that processing by a farmer of his own crops for market was intended to be exempt under the agriculture exemption, regardless of the status under the Act of processing done by an independent plant separate from the grower. Thus Congress was fully aware of the fact that a farmer processing his own crops for market might enjoy a competitive advantage over the grower who did not have his own processing facilities. To relieve any inequity resulting to the small farmers who do not have their own packing or processing plants, Congress enacted Section 13(a) (10). See Maneja v. Waialua Agricultural Company, 349 U.S. 254, 267-268. But Congress did not make the agriculture exemption dependent upon whether it had succeeded in every instance in relieving the inequity.

Senator Overton asked Senator Black whether, if a farmer has a large cotton plantation and gins his own cotton, the ginning operation is exempt. Senator Black replied in the affirmative, that such cotton ginning would be a process in the agricultural handling of cotton. Id., p. 7657.

Later in the debates, Senator Black, commenting upon a suggestion of Senator Schwellenbach that the line of distinction be made at the point of agricultural operation and that "when it becomes a processing operation, a canning operation, it ceases to be an agricultural operation," stated as follows: "Going into another phase of fulming, let us take the man who raises hogs. A great many farmers who raise hogs kill their logs on their own farms.

They prepare the hogs for market on their own farms, and then send out the product. As the bill is framed, there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; . ." [Emphasis supplied]. Id. p. 7659.

The reported bill exempted "such processing . . . as is ordinarily performed by farmers as an incident of farm operations." Supra, p. 31. But the word "ordinarily" was later stricken from the exemption before the bill was enacted.

Senator McGill later introduced an amendment (Id., p. 7888) to provide that the agricultural exemption should apply not only to practices performed by a farmer as an incident to his farming operations, but also to practices performed on a farm as an incident to such farming operations. His amendment further provided that following the words "any practices ordinarily performed by a farmer or on a farm as an incident to such farming operations," there be added the words "including delivery to market". Senator McGill stated that his amendment would exempt all kinds of labor performed in connection with making delivery to market of agricultural products. Id., pp. 7888, 7927, 7928. The amendment was adopted. Id., pp. 7888, 7927, 7928. The amendment was adopted.

-Petitioner refers to the rejection of an amendment offered by Senator Reynolds of North Carolina to exempt certain tobacco warehouses, as purportedly showing that

¹⁷ The discussion on the McGill amendment and also on a related amendment introduced and then withdrawn by Senator McAdoo appears in Appendix B, pp. 98-101, infra.

Congress omitted the type of work here involved from the agriculture exemption when performed by the tobacco grower upon his own crops (Pet. Br., pp. 42, 52; Pet. Sep. App., pp. 100-119). It is perfectly plain, however, that Senator Révnolds' amendment did not refer to a tobacco packing plant such as King Edward's, in which a farmer prepares his own tobacco for market, but rather referred to the seasonal auction warehouse to which growers of non-cigar tobacco bring their tobacco for sale, immediatelyafter it has been "cured" and graded in the farmers' barns.18 (81 Cong. Rec. 7878-7880). The debates also show that Senator Reynolds' amendment was rejected largely because other provisions of the bill then being debated already provided exemption for seasonal activities (81 Cong. Rec. 7880, 7883, 7886). Furthermore, the Reynolds amendment was a self-contained amendment providing exemption from the operation of the entire statute rather than directed to the agriculture exemption as such (81 Cong. Rec. 7878; Pet. Sep. App., p. 100); and by the time it was debated and disposed of, there had already been

^{18 &}quot;The auction, or loose-leaf market, is now the prevailing system of selling tobacco in all tobacco-growing territory from south-.. ern Ohio and Indiana southward, in which are included all states south of the Ohio and Potomae Rivers in which tobacco is grown on a commercial scale (except for the eigen-leaf districts of Fiorida and Georgia). Reduced to its simplest terms, an auction floor is a place where growers may deliver their tobacco and have it auctioned off to the highest bidder, the bidders being buyers for manufacturers, dealers, exporters, or speculators. The system is of vast proportions, represents a large total outlay of capital and the employment of large numbers of people, and provides the means for selling more than a billion pounds of tobacco annually during the months from August to April" [Emphasis supplied]. Circular 249. p. 61, supra. See also pp. 6 et seq., 123-124, of such Circular; and Yearbook of Agriculture, 1954 (U.S. Department of Agriculture) p. 440.

full debate showing that the farmer as such was wholly exempt when preparing his crops for market, as for example, when he bottled his milk, packed his apples, ginned his conton or slaughtered his hogs. In the light of such debate, it cannot be seriously questioned that the Senate fully comprehended that the tobacco farmer, like the dairy farmer, fruit farmer, cotton farmer, or livestock raiser, was totally exempt when preparing his own crops for market.

The bill passed by the Senate on July 31, 1937 defined "agriculture" in relevant part as including

"... any practices ordinarily performed by a farmer or on a farm as an incident to such farming operations, including delivery to market [Emphasis supplied].

2. House proceedings.

The bill was thereupon referred to the House Committee on Labor. As reported by that Committee on August 6, 1937, "agriculture", insofar as relevant here, was defined as including

"... any practices performed by a farmer or on a farm as an incident to such farming operations, including delivery to market..." [Emphasis supplied]. \$2(a)(7), S. 2475 as reported, Union Calendar No. 535, 75th Cong., 1st Sess., pp. 4-5.

The bill as reported by the House Committee thus struck "ordinarily" from the definition of agriculture, so that the definition included any practices performed by a farmer or on a farm as an incident to farming operations, without qualifications. The Committee report made specific reference to the fact that it had struck the work "ordinarily", thus showing that such action was not inadvertent. He Rep. 1452, 75th Cong., 1st Sess., p. 11. And the definition as ultimately enacted did not contain the word "ordinarily" of any similar limitation.

The Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill-by petition of the House membership. However, on December 17, 1937, the bill was recommitted to the Labor Committee. At that time, insofar as relevant, "agriculture" was still defined as when the bill was reported on August 6, 1937.

On April 21, 1938, another draft of S. 2475 was reported to the House. As reported the definition of "agriculture" was again broadened, and, insofar as relevant, read as follows:

"'Agriculture' includes . . . any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" [Emphasis supplied']. §3(f), S. 2475, 75th Cong., 3d Sess., reported with amendment, Union Calendar No. 804, p. 50; H. Rep. 2182, 75th Cong., 3d Sess., pp. 2, 8.

This definition added the phrases: "preparation for market, delivery to storage... or to carriers for transportation to market". The bill passed the House on May 24, 1938 in this form. 83 Cong. Rec. 7397, 7450.

Petitioner refers to certain amendments offered in the House by Congressman Cooley and Barden to exempt persons employed in tobacco auction warehouses from both the wage and overtime provisions of the Act or simply from the overtime provisions (Pet. Br., pp. 42-43, 52; Pet. Sep. App., pp. 119-133). He contends that the rejection of such amendments shows that the Congress did not intend the agriculture exemption to apply in the circumstances here. But it will be noted that of such amendments only Congressman Barden's, offered on December 17, 1937 (S2 Cong. Rec. 1783; Pet. Sep. App., pp. 119-122), was directed to the agriculture exemption. Moreover, none of such amendments related to a farmer preparing his own tobacco for market, and none related to Type 62 tobacco.

which is not sold through auction warehouses at all. Supra, p. 35, note 18.

3. Conference Report and debates thereon.

The Conference Report not only retained every single amendment that had broadened the definition of "agriculture", but it made that definition still more inclusive by exempting all practices performed by a farmer or on a farm "in conjunction with such farming operations". 83 Cong. Rec. 9246-9247. Thus Congress was even unwilling to restrict the definition to practices that were incident to farming operations, but made explicit its intent that the exemption should apply as well to practices in conjunction with jarming operations.

In Senate debate on the Conference Report, Senator Elbert D. Thomas, who had succeeded Senator Black as chairman of the Senate Committee on Education and Labor and was chairman of the Senate conferees, stated that the agricultural exemption was purposely all-inclusive. 83 Cong. Rec. 9162-9163. See Appendix B, pp. 101-102, infra.

4. Conclusion on legislative intent ..

Thus, from the very beginning of the legislative consideration of the Act, a comprehensive exemption of agriculture was a primary consideration of Congress. Congress started with such a comprehensive exemption, and at every stage of its consideration by one or the other of the houses of Congress, as the bill worked its way through to passage, the definition was made more and more all-inclusive. See Waialya, 349 U.S. 254, 260.

Congress also recognized from the outset that the exemption was to include "processing" when performed by the farmer as an incident to his farm operations. Petitioner's contention to the contrary (Pet. Rr., pp. 52-53) will not bear analysis:

In its Waialua opinion, in describing the operations of a farmer which are exempt under Sections 13(a).(6) and 3(6), 349 U.S. at pp. 265, 268.

Second, Petitioner's argument is simply one of semantics. Regardless of whether King Edward's packing plant operations may properly be described as "processing", such operations clearly fall within the statutory exemption for "any practices... performed by a farmer... as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market".

Third, even if King Edward's packing plant operations may properly be called "processing", the debates in the Senate clearly show that where a farmer processes for market only his own grown crops, such processing was intended to be exempt, whether it was done by a dairy farmer bottling his milk, an apple farmer packing his apples, a cotton farmer ginning his cotton, a livestock raiser slaughtering his hogs, etc.

The debates, to which Petitioner alludes (Pet. Br., pp. 53, 45-46) as evidencing a contrary intent, relate to the area of production exemption under Section 13(a)(10) discussed hereinafter, and not to the Section 13(a)(f) agriculture exemption here discussed. We shall show hereinafter, p. 69, that even as to Section 13(a)(10) such debates do not support Petitioner's position. And even if, as Petitioner contends (Pet. Br., p. 51), an operation is not exempt under Section 13(a)(6) if it is omitted from Section 13(a)(10), the operations here involved are nevertheless included within Section 13(a)(10). Infra, pp. 58-63.

Fourth, by selecting the word "practives" rather than the word "processing" for use in the agriculture definition, Congress selected a more comprehensive work that in

cludes not only processing but other activities as well. The statutory definition gives as examples of "practices" "performed by a farmer", which are to be exempt, the following: "preparation for market", "delivery to storage", "delivery to market", and "delivery to carriers for transportation to market". The Senate debates recognize that "processing" by a farmer is a form of preparation for market. But "processing" does not describe the other illustrations of "practices" in the statutory definition, so that Congress could not substitute the word "processing" for the word "practices", as suggested by Petitioner (Pet. Br.; p. 53).

It is also noteworthy that unlike similar language in Section 13(a)(10), the exemption for "preparation for market" is not limited by the requirement that the "preparation for market" of the agricultural commodities be of the commodities in their raw or natural state. Hence, any preparation for market by the farmer is exempt even if in such preparation, the raw or natural state of the commodities is changed. Accordingly, even if contrary to our contention the packing plant operations here effect a change in the raw or natural state of the tobacco, such operations are nevertheless exempt.

Without the broad definition of "agriculture" which was written into the bill, it is a reasonable conclusion from the legislative history that the bill would not have been enacted into law (83-Cong. Rec. 7393, 9257).

No distinction was drawn by Congress between "large" or "small" farms or between "hand labor" or "mechanized" farms. Waialua, 349 U.S. 254, 261, 265. And throughout American agriculture, growing operations are commonly integrated with processing operations. Supra, pp. 25-26, 32-34.

C. RELATED EXEMPTIONS FOR AGRICULTURAL PROCESSORS EMPHASIZE THE FAR-REACHING CHARACTER OF THE AGRICULTURE EXEMPTION.

The determination of Congress to exempt all activities conducted by the farmer as an incident to or in conjunction with his farming operations is underscored by the widespread exemptions which were also granted to nonfarmer processors of agricultural commodities in Sections 7(c) and 13(a)(10). The legislative history shows that those exemptions were granted in order to avoid imposing additional costs upon the fariner. See in particular 83 Cong. Rec. 7325, 7326, 7401, 7402, 7407-7408; and see also 81 Cong. Rec. 7648-7673, 7876-7888, 7927-7929, 7947-7949, 7957, and 83 Cong. Rec. 7419, 9162-9163, 9250, 9252, 9254. In fact, as the Congressional debates show, such exemptions were an integral part of the same general exemptive scheme for agriculture. 'See Waialya, 349 F.S. 254, 267-268; Addison v. Holly Hill Fruit Products, 322, U.S. 607, 612-613.

ommodities by non-farmers to spare the farmer additional costs, it manifestly intended the comprehensive language of Section 3(f) to exempt operations by farmers themselves, where additional costs would be even more certain.

D. THE DECIDED CASES SUSTAINS THE EXEMPTION OF KING EDWARD UNDER SECTIONS 3(f) AND 13(a)(6).

The foregoing analysis of the language and legislative history of the agriculture exemption is fully supported by this Court's decisions in Maneja v. Waialua Agricultural Company, 349 U.S. 254 and Farmers Irrigation Company v. McComb. 337 U.S. 755, the only two decisions of this Court dealing with the agriculture exemption.

1. Waialua Case

a). In the Waialua case this Court denied the agriculture exemption to the sugar-milling operation of a large Hawaiian sugar plantation which milled only the sugar cane grown on the plantation. After pointing out that the status of farmers milling their own sugar vis-a-vis the agriculture exemption may well be sui generis (349 U.S. at 267), the Court spessed the omission of sugar milling from Section 13(a)(10). But the Court added that "all other forms of quasi-industrial processing—ginning, canning, packing, etc." are enumerated in Section 13(a)(10).19 And if enumerated there, the processing is likewise within the agriculture exemption when performed by a farmer upon his own products. Id., p. 268. Thus, the Court pointed out that by virtue of Section 13(a)(10) the cotton farmer without a gin was placed upon an equal footing with farmers who ginned their own cotton, the latter being exempt under Section 13(a)(6), 349 U.S. at pp. 267, 268. It follows that a tobacco farmer without his own packing plant was also placed upon the same footing as a tobacco farmer with a packing plant. The former enjoys the benefit of the Section 13(a)(10) exemption; the latter the Section I3(a)(b) exemption.

The majority opinion in the Waialua case (id., p. 268) stated that the purpose of Section 13(a)(10) was to equalize the status of small and large farmers under the Act; and that sugar milling is not exempt under Section 13(a) (6) because it is likewise excluded from Section 13(a)(10). The concurring and dissenting opinion (id., p. 279) disagreed with this conclusion, stressing that Section 13(a) (10) was added late in the legislative development of the bill, not to restrict existing exemptions but to create fur-

¹⁹ That the operations involved here are indeed enumerated in Section 13(a)(10), see pp. 58-63, infra.

ther exemptions. In regard to the majority view, we submit:

First, the tobacco packing here involved is an operation included in Section 13(a)(10). Infra, pp. 58-63.

Second, the statements upon which Petitioner relies (Pet. Br., pp. 51, 58-59), are strictly applicable only to sugar milling which presents a unique borderline case (see 349 U.S. at 264, 267) and cannot be given the sweeping construction for which Petitioner contends, namely that no operation is exempt under Section 13(a)(6) unless it is also exempt under Section 13(a)(10). For example, the Waialua opinion expressly stated that cotton ginning, if performed by the farmer upon his own crops, is exempt under the agriculture exemption (349 U.S. at 267); and it implied as much with respect to canning and packing and in fact all forms of quasi-industrial processing of agricultural commodities other than sugar milling, because all such operations are also enumerated in Section 13(a)(10). Id., p. 268. Yet undoubtedly many gins, canneries and packing plants are not within the "area of production". That does not mean that a farmer, who is canning, packs ing, ginning, etc., his own crops for market is not exempt under the agriculture exemption. If it meant that, then no farmer preparing his own crops for market could ever enjoy the agriculture exemption because, as the Administrator has recognized, there are always some independent plants engaged in the same activities which are not within the "area of production". See Administrator's Findings published in connection with his definition of "area of production" (Pet. Sep. App., pp. 12-13).

Moreover, at one point in this liftigation Petitioner responded as follows to Respondent Budd's request for ad-

²⁰ In Addison v. Holly Hill Fruit Products, 322 U. S. 607, 615, this Court recognized that Section 13(a)(10) was added "for enlarging the range of agricultural exemption".

missions as to American Sumatra Tobacco Corporation, another tobacco company in the Quincy area engaged in operating a packing plant at which it prepares for market only the tobacco grown by itself:2

"The status of American Sumatra Tobacco Corporation, a farmer, is immaterial to this cause. The reason the employees of defendants may not be exempt is because they are not engaged in farming, nor are they employed by a farmer or on a farm. If the employees of American Sumatra Corporation are exempt it is by virtue of Section 13(a)(6), which section was inserted by Congress itself. Section 13(a)(6) is a separate and distinct section applying to employees employed in agriculture. Congress went further and defined agriculture. Congress thereby indicated its considerations of farmers and agriculture. However, Congress recognized that there might be instances where Section 13(a)(6) would not apply and an exemption would be desirable. It passed Section 13(a) (10), but recognizing the gigantic task of formulating a set of standards defining "area of production" which would be applicable on a nation-wide basis it declined to define these terms and delegated to the Administrator the duty of so doing. Section 13(a)(10), with which we are here concerned, is a complete section in itself and cannot be defined or interpreted by reference to other sections of the Act. Defendants' position cannot be discussed with reference to Section 13(a)(6) since they are not farmers, but are manufacturers, nor do their activities constitute farming nor do they occur on a farm" [Emphasis supplied] (RB 51).

Petitioner thus has himself admitted in this very litigation that a farmer's exemption under Section 13(a)(b) does not depend upon whether the independently owned packing plant which packs tobacco grown by others enjoys exemption under Section 13(a)(10).

²¹ Petitioner has also brought suit against American Sumatra-Tobacco Corporation, but such suit is being held in abeyance pending disposition of the instant litigation (RK 57, 84A, 86)...

Furthermore, in hearings held in 1949 before the House Committee on Education and Labor on various amendments to the Act, the Administrator made it plain that the agriculture exemption in the Act did not depend upon the exemptions granted in Section 13(a)(10) to independent processors. The Administrator was at that time asking Congress to eliminate the Section 13(a)(10) exemption, but he stated that that would have no effect upon the agriculture exemption (Hearings on H.R. 2033, 81st Cong., 1st Sess.):

"Mr. Barden. Then you do not regard that the authority you ask for here in any way interferes with the growing and the carrying to market, and packaging, and so forth, and so on, of the operations carried on by the farmer and his employees?

"Mr. McComb (The Administrator). That is right. "Mr. Weiss (Director, Wage Determinations and Exemptions Branch, Wage and Hour and Public Con-

tracts Divisions). That is on wages and hours.

"Mr. Barden. And that carries him to when he delivers it to the market, and it passes beyond his control; is that right?

"Mr. McComb. The first process; yes." . . . (p. 79).

- b). In Waialua this Court also emphasized other factors in determining the applicability of the agriculture exemption. Most of such factors are present here. Thus:
- (i) King Edward's growing operations are substantial and are not a mere facade for an otherwise industrial operation. 349 U.S. at 264. King Edward's farms have an aggregate acreage of approximately 3800 acres, 892 of which are under cultivation and 206 of which are devoted to tobacco growing. Supra. p. 5. Moreover, an affidavit filed in the District Court by Petitioner's own investigator shows that in the 1954 crop year King Edward grew 240,498 pounds of tobacco on its farms, and

that the cost to King Edward for growing its 1950 tobacco was approximately \$482,000 (RK 13, 14).22

- (ii) The product resulting from Respondent's operation is fermented tobacço leaf. As the Court below found, supra, p. 8, fermentation involves only natural, not artificial, changes in the tobacco leaf. See also p. 66, infra. This differs from the milling of sugar cane, which transforms such cane by a manufacturing process. Hence, there is no basis for analogizing fermentation to manufacturing. 349 U.S. at 264-265. There is no foundation for Petitioner's contention that bulking is a manufacturing operation which greatly changes the "raw or natural state" of the tobacco (Pet. Br., pp. 57-58). At most, Petitioner shows only that bulking effects chemical changes in the tobacco leaves, which are simply natural 5 changes, without the addition of any external element, commencing in the curing barns on the farm and continuing in the bulking operations at the packing plant: Supra, pp. 7-8. The bulking operation is hardly comparable to milling sugar cane, which transforms the cane. from its raw or natural state into raw sugar or molasses,
- (iii) The same employees work on King Edward's farms and in its packing plant. Supra, p. 9, 349 U.S. at 265.
- (iv) King Edward's tobacco packing operations are not industrialized as alleged in Petitioner's brief, pp. 53, 56, 57. Unlike the mill workers involved in Waialua, the employees here are not typical factory workers, but rather are ordinary farm laborers largely engaged in unskilled manual work. Supra, p. 7; see also RK

²² The affidavit referred to was offered in opposition to King Edward's first motion for summary judgment. Supra, p. 12. The affidavit shows the substantial nature of King Edward's tobacco growing operations, although the figures therein relate to the aggregate operations at all three packing plants of King Edward, including two plants not involved in this action (RK 59).

- 75. 349/U.S. at 265. In any event, as this Court also recognized in Waiahaa (349 U.S. at 261, 265), if the packing plant operations are part of King Edward's agricultural venture, they would be within the agriculture exemption, even if they were industrialized and involved highly specialized mechanical tasks.
- (v) King Edward's packing plant operations are a normal incident to the cultivation of Type 62 tobacco, since 70 per cent of all such tobacco grown in the Quincy area is bulked and prepared for market in the packing plants of the growers. Supra, p. 10. 349 U.S. at 267.
- (vi) In Waialua this Court referred to the fact that Section 7(c) grants a complete exemption from the overtime provisions of the Act to sugar milling and it suggested that this may have been considered a satisfactory answer to the difficult problem posed in determining whether sugar processing copies within the agriculture exemption. 349 U.S. at 267. But the tobacco operations involved here are not specifically granted any exemption in Section 7(c). Tobacco as such is not even mentioned in Section 7(c).

In any event, as this Court further recognized, the exemption of an operation in Section 7(c) does not preclude the application also of the agriculture exemption to the same operation, because

"... section 7(c) includes similar exemptions for operations like cotton ginning, which are also within the agriculture exemption if performed by the farmer on his own crops." 349 U.S. at 267.23

on the application of the agriculture exemption to an agricultural processing operation are: (vii) the investment in the processing operation as opposed to the ordinary farming activity: (viii) the time spent in processing and in ordinary farming; and (ix) the degree of separation by the employer between the various operations. 349 U.S. at 265. As to (vii) and (viii) the Record here is

2. Farmers Irrigation Case

The ruling of the court below is likewise in Jull harmony with this Court's decision in Farmers Irrigation Company v. McComb, 337 U.S. 755, holding that the employees of a farmers mutual irrigation company were not within the agriculture exemption. The irrigation company owned several reservoirs and a system of canals which were operated and maintained by its employees. The company's sole activity was the collection, storage and distribution of water for irrigation purposes to its own stockholders, all of whom were farmers. However, the irrigation company was not a farmer because it did not grow anything and none of its activities was performed on a farm.

This Court noted that "fortunately... the ... Act provides a carefully considered definition" of agriculture. 337 U.S. at 762. The opinion then referred to the two distinct branches of the definition of "agriculture". Supra, pp. 26-27. The opinion concluded that the activities of the employees of the company did not come under the first branch of the agriculture definition—the primary meaning of farming in all its branches—because the company "owns no farms and raises no crops" (id., p. 763) and "is not engaged in cultivating or tilling the soil or in growing any agricultural commodity" (id., p. 764). The Court then said concerning the company's irrigation work (337 U.S. at 766):

". . . coming to the second branch of the definition of agriculture [the broader meaning] . . . it does con-

plant are physically separate, but as this Court recognized elsewhere in its opinion in Waialua, even if a farmer achieves an "extraordinary degree of specialization" that alone does not deprive him of the exemption. 349 U.S. at 263, 265. A fortiori the exemption is not lost by King Edward here, which uses its same working force at both farm and packing plant, merely because the farm and packing plant are physically separate.

stitute a practice performed as an incident to or in conjunction with farming. If the Act exempted all such practices, the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm."

The Court odded (id., p. 767):

"In the face of this careful use of language, we are required to limit the exemption as Congress intended it should be limited, to practices performed by a farmer or on a farm. In the present case it is clear that the work of the company's employees is done neither on a farm or by farmers."

In the instant case, however, King Edward does raise crops, does cultivate and till the soil, and does operate farms, and consequently the employees, when performing these activities, clearly come within the first branch of the agriculture definition. And the packing plant activities of King Edward, do constitute "practices . . . performed by a farmer . . . as an incident to or in conjunction with" the cultivating, tilling, growing, etc., operations performed by King Edward, and therefore come within the second branch of the agriculture definition. Significantly, note 15 to this Court's decision (id., p. 766) clearly indicates that the processing of agricultural commodities is incidental to or in conjunction with the farming operation by which the commodities are produced. It neces sarily follows that the processing by the farmer of commodities produced by the same farmer is incidental to or in conjunction with the farming activities of that farmer, and hence is within the agriculture exemption. That Is precisely the situation involved here."

²⁴ See also the following lower court decisions, which have applied the agriculture exemption to employees engaged in activities other than cultivation of the soil, and notwithstanding the mechanized or industrialized character of the operations involved: Damutz V. Pinchbeck, 66 F. Supp. 667 (D. Conn. 1946), A58 F. (2d) 882 (C.C.A. 2) (fireman in greenhouse, where the growing of horticultural products is highly mechanized). Walling V. Rocklin.

E. THE PUBLISHED AND OUTSTANDING ADMINISTRA-TIVE INTERPRETATIONS OF THE DEPARTMENT OF LA-BOR ALSO SUPPORT THE EXEMPTION OF KING LO-WARD'S PACKING PLANT EMPLOYEES UNDER THE AGRI-CULTURE EXEMPTION.

In 1939, shortly after the enactment of the Act, the Department of Labor issued Interpretative Bulletin No. 11 (WHM 35:351 et seq.) in which it announced various interpretations of Sections 13(a)(b) and 3(f) and also of Section 7(c) and Section 13(a)(10). The interpretations in Interpretative Bulletin No. 11 represented the "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion", and as such are entitled to great weight. United States v. American Trucking Associations, Inc., 310 U.S. 534, 549.

Section 10(b) of Interpretative Bulletin No. 14 set forth the interpretations with regard to the scope of the

¹³² F. (2d) 3 (C.C.A. 8) (employees of a florist shop located in a city, packing and selling flowers grown by the employer at its greenhouse several miles away and also some flowers purchased from others); Miller Hatcheries V. Boyer, 131 F. (2d) 283 (C.C.A. 8) - (employees in an industrialized commercial hatchery located in a city); Jordan V. Stark Bros. Nurseries, 6 Labor Cases [61,468] (W.D. Ark. 1942) (employees of a nursery engaged in transporting trees from the fields where grown to a packing shed of the employer and there sorting, grading and tying the trees into bundles for shipment in interstate commerce); and Briting V. Hills Brothers Co., 7 Labor Cases 761,763 (D. Puerto Rico 1943) (employees engaged in canning and packing grapefruit and curing of citron raised by the employer on its own farms). See also Dofflemcuer v. NLRB, 206 F. (2d) 813 (C.C.A. 9) (agriculture exemption in National Labor Relations Act held applicable to employees of a grape packing and storage plant, owned by three partners, where all the grapes were grown in groves owned by the partnership or by the individual partners. By virtue of appropriations acts for the National Labor Relations Board, enacted annually since 1946, the Board and the Courts are required to apply the Fair Labor Standards Act's definition of "agriculture" in cases arising under the National Labor Relations Act).

branch of the agriculture definition. The term was defined as including various operations performed by farmers to make ready their products it market, such as packing and canning fruits and vegetables, packing and canning dairy products, ginning cotton, manufacturing raw sugar and molasses from sugar cane and also "bandling, drying, bulking, stripping, twing, sorting, stemming, packing, and storing" tobacco. [Emphasis supplied] WHM 35:355.25 It will be noted that many of the operations declared exempt involved a substantial change in the raw or natural state of the agricultural commodities.

²⁵ See also the testimony of Administrator Walling before the Senate Committee on Education and Labor on S. 1349, 79th Cong., 1st Sess., page 236 (1945):

[&]quot;Senator Ellender. Well, then, let me put it this way—I desire to put it in the affirmative now and be more specific—should a large fruit grower have a processing plant of his own, and should he prepare his fruit for market on his own farm, then neither the present law nor the act we are considering would in any wise affect him?

[&]quot;Mr. Walling. I think that is correct.

[&]quot;Senator Ellender. Suppose, on the other hand; that a few farmers, small farmers, got together and agreed to purchase machinery for processing their own fruit in the same manner as the large grower does—would they be covered by the proposed act, or would they be exempt?

r "Mr. Walling. I think they would be covered insofar as any produce is handled which is not raised on the particular farm. That is, the exemption goes to the farmer and his employees, but not to handling of products by someone else, raised by someone else." LEmphasis supplied.

The distinction thus drawn by the Administrator has been consistently followed by him and the Secretary from the beginning. See also similar testimony by the Department of Labor in Hearings on H.R. 2033, House Comm. on Education and Labor. Sist Cong., 1st Sess., p. 79, (que'ed'supra, p. 45), held in 1949 to consider amendments to the Act which later eventuated in the Fair Labor Standards Amendments of 1949. See also p. 97 of such Hearings.

In addition to the interpretations in Interpretative Bulletin No. 14, the Administrator and his staff have announced other opinions, which show the operations here in question to be exempt. Thus they have held as follows under Section 13(a)(6):

- 1. Handling of tobacco at a warehouse by the farmer who grows the tobacco is exempt, including drying, redrying and further processing the tobacco. The exemption is not limited to "first processing" operations, but extends as well to further processing so long as the farmer works upon the tobacco he grows himself. WHM 35:752-753 (Opinion of May 22, 1942).
- 2. Tobacco stemming by a farmer is exempt. 3 C.C.H. Labor Law Reporter ¶25,242.344 (Opinion of November 16, 1938). This opinion goes far beyond the situation involved here, where the tobacco is merely bulked, sorted, baled and shipped, and is not stemmed, cut or otherwise processed (RK 50).²⁶

Furthermore, at one point in this very litigation Petitioner virtually admitted that a tobacco packing plant in the Quincy area engaged in preparing for market only the tobacco that it grew itself was within the agriculture exemption (RB 51, 45). Supra, p. 44.27

The foregoing interpretations have hever been changed by a re-publication of Bulletin So. 11 or by a press release or by any other means bringing the change to the attention of employers, employees, and the public generally. And unlike the Administrator's report to Congress of a changed interpretation on sugar ulling (Maneja v.

²⁶ Stemming consists of removing the central vein or rib from the tobacco leaf. Puerto Rico Tobacco Mktg. Coop. Ass'n V. Mc-Comb. 181 F. (2d) 697, 698.

The various pertinent administrative interpretations relating to the agriculture exemption, including those referred to in the text, are set forth in Appendix C. pp. 102-108. infra.

Waialua Agricultural Company, 349 U.S. 254, 269-270), the Administrator has never advised Congress of any changed interpretation as to tobacco packing and processing. The above interpretations relating to tobacco packing were therefore in effect on the date of the 1949 amendments. See also testimons of the Department of Labor, in hearings preceding such amendments. Supra. pp. 45 and 51, note 25. It is significant in this connection that Petitioner's brief is silent as to his administrative interpretations on this matter under Section 13(a)(6). This silence is to be contrasted with his argument that his altegedly changed definition of "area of production" and interpretation of Section 13(a)(10) were "ratified" by the 1949 amendments to the Act (Pet. Br., pp. 32-35, 48-49).

In this case, Petitioner is seeking to overturn such interpretations of almost 17 years' standing concerning the agriculture exemption. He asserts that he no longer agrees with the position stated in his own Interpretative Bulletin and in his other outstanding interpretations. This is the first time that the Secretary or Administrator has sought to enforce the Act with respect to a tobacco packing plant operator who handles and prepares for market only the tobacco that he grows on his own farms. And it is doubtful that the Secretary would have tried to do this.

and Hour Office has been maintained in Florida, manned with personnel engaged in the enforcement of the Act. Annual Reports to Congress of the Wage and Hour and Public Contracts Divisions: 1939, Chart XVII. p. 122: 1948. Chart 1, page 3: 1951 p. ii. 1953, p. iii. Frequent inspections have been made through the years of tobacco packing plants in the Quincy area to check on compliance with the Act. At no time until the present case has the Secretary or Administrator sought to enforce the Act with respect to employees of such packing plants, when the plants handle and prepare for market only the tobacco they grow there eives. To the contrary, in administering the Act, the Wage and Hour officials have always treated such employees as exempt.

had he not been so urged by the District Court. (RK 56, 57; see also RK 37).

The Secretary's effort to alter his interpretations radically and to gain judicial justification therefor is contrary to this Court's holding in Walling v. Halliburton Co., 331 U.S. 17, 25-26. This Court there declined to depart from a decision rendered under the Act five years before, pointing out that employers had regulated their affairs on the faith of the earlier decision. See also Miller Hatcheries v. Boyer, 131 F. (2d) 283, where the Eighth Circuit rejected' a contention urged by the Administrator as amicus curiae, where such contention wasse contrary to a long-established administrative interpretation, made; soon after the Act went into effect and consistently followed, that the operation of a commercial chick hatchery came within the agriculture, exemption. And see too Skidmore v. Swift &. Co., 323 U.S. 134, 140, where this Court pointed out that the weight to be given an administrative interpretation under the Fair Labor Standards Act

"will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

²⁹ Section 11(a) of the Act gives Petitioner extensive powers of administration, including full investigatory power and including the right to bring injunction suits to restrain violations of the Act. The thoroughness with which these powers of administration have been exercised is attested by the many injunction actions which have been brought. See, for example, the following Annual Reports to Congress of the Wage & Hour & Public Contracts Divisions: 1948, p. 37; 1949, pp. 14-15; see also Annual Report of Secretary of Lator to Congress for fiscal year 1953, p. 13. These activities contrast sharply with the failure of Petitioner or the Administrator until now to seek to enforce the Act with respect to a tobacco packing plant operator who handles and prepares for market only the tobacco that he grows himself on his own farms.

The interpretation which the Secretary seeks to enforce here is inconsistent with the language of the exemption provision, its legislative history, the case law, and with the continued exemption of processing of other commodities such as fruit packing and canning canning canning darry products, and cotton ginning (Interpretative Bulletin No. 14, IIO), supra, p. 51), which are much more tindustrialized. The Secretary's changed opinion is therefore entitled to no weight.

F. OTHER ERRONEOUS ARGUMENTS OF PETITIONER.

Petitioner seeks to analogize King Edward's packing plant to "redrying plants", which he asserts perform the first off-the-farm operations on non-cigar types of tobacco comparable to the bulking of Type 62 tobacco (Pet. Br., p. 56, note 23).

The analogy is not apt. The position of "redrying plants" in the marketing of tobacco may be briefly described as follows ": Flue-cured tobacco, the principal type of tobacco grown in the United States, is cured in curing barns on the farm by applying regulated heat through furnaces and flues built into the barns. The tobacco leaves are then sorted on the farm into lots on the basis of quality and color and taken to auction warehouses for sale. The sale at auction constitutes the marketina of such tobacco. The auction method of marketing tobacco applies also to all other types of tobacco except cigar leaf tobacco of Georgia and Florida. (Supra. p. 25, note 13.

Flue-cured tobacco is delivered by the growers to the auction warehouses with a moisture content of from 20

This description is taken from "Tobacco Shrinkages and Lisses in Weight in Handling and Stora", U. S. Department of Agriculture, Circular No. 435, July 1937, pp. 6, 9, 10. See also Yearhook of Agriculture, 1954 (U. S. Department of Agriculture) p. 440.

to 25 per cent. It packed directly in hogsheads, it would mold. Accordingly, the tobacco is removed from the auction warehousy as soon as the auction sale is made, and delivered to the redrying plant of the buyer, who is commonly a manufacturer. There it is sorted and run through a redrying machine:

"Practically all the original moisture is removed in this machine and a desired amount is added to condition the tobacco for packing without breakage and to allow it to go through the natural termentation process or sweat while in storage without damage by mold. The redrying process also distributes the moisture uniformly [Emphasis supplied]. Circular No. 435, U.S. Department of Agriculture, p. 10.

Thus, "redrying plants" differ in several material respects from King Edward's packing plants. First; the farmer has already marketed his tobacco through sale at the auction warehouse before the redrying plants work on the tobacco. Torthe contrary, in the case of Type 62 tobacco, as found by the Court, of Appeals, the packing plant operations of King Edward are "essential for the marketing of [King Edward's] crops" (RK 93). Second, the redrying plant is operated by the manufacturer who buys the tobacco at the auction warehouse, while King Edward's packing plant is operated by the farmer, King Edward. Third, the natural fermentation process in the case of non-cigar tobacco takes place after the fobacco has been redried, while here the fermentation is merely an extension of the barn-curing process (supra. h. 8) and takes place immediately after the tobacco is delivered from the farm to the packing plant.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYEES OF RESPONDENTS KING EDWARD AND BUDD, WHO HANDLE
AND PREPARE TOBACCO FOR MARKET AT SAID
RESPONDENTS' PACKING PLANTS, ARE ENGAGED
IN ACTIVITIES ENUMERATED IN SECTION 13(a)
(10); AND THE COURT OF APPEALS ALSO CORRECTLY HELD THAT THE ADMINISTRATOR'S
DEFINITION OF "AREA OF PRODUCTION" IS INVALID AS APPLIED TO THE FACTS HERE INVOLVED. ACCORDINGLY, THE COURT OF APPEALS CORRECTLY REVERSED THE DISTRICT
COURT AND ORDERED JUDGMENT FOR RESPONDENTS.

Section 13(a)(10) of the Act exempts from the wage and overtime provisions thereof

"any individual employed within the area of production (as defined by the Administrator), ngaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

In order for an employee to be exempt under Section 13(a)(10) it must appear that; (a) he is engaged in an operation enumerated in the Section, e.g., handling, packing, etc., agricultural commodities, (b) he is performing such operations "for market" and (c) he is so engaged in such operations within the "area of production". As the Court of Appeals held (RK 94-95, RB 163-164), Respondents' employees at their packing plants meet requirements (a) and (b). So far as requirement (c) is concerned, Respondents satisfy the Administrator's definition of "area of production" in regard to mileage distance from the farms where the tobacca is grown, but do not meet the added requirement excluding relates located

in towns with populations of 2500 or more. Respondents contend that the Court of Appeals properly held invalid the population test, as applied to the situation here involved (RK 93, note 7; RB 163, note 7). Accordingly the Court of Appeals correctly reversed the injunctions granted by the District Court and ordered judgment for Respondents.

As to Respondent King Edward, these contentions in re-Section 13(a)(10) are material only if, contrary to our earlier contentions herein; the Court concludes that the, employees of King Edward here involved are not exempt under the agriculture exemption provided by Section 13-(a)(6).²³

A. RESPONDENTS' EMPLOYEES AT THEIR PACKING PLANTS ARE ENGAGED IN "HANDLING, PACKING, STORING. [AND] DRYING ... [AN] AGRICULTURAL ... COMMODIT[Y]" WITHIN THE MEANING OF SECTION 13(a)(16).

1. The employees are engaged in such operations within the common and technical meanings of such terms and also within the Administrator's published and outstanding interpretations thereof.

Tobacco is, of course, an agricultural commodity. Hence if the Respondents' packing plant employees are engaged in "handling", "packing", "storing", or "drying" tobacco after it reaches the packing plants from the farms on which it is grown, they are performing operations enumerated in Section 13(a),(10). The only evidence in support of any alleged violation of the Act by King Edward, appearing in a stipulation of the parties, shows that at its packing plant in Quincy here involved,

The District Court ignored completely, Respondents' contentions as to Section 13(a)(10). Supra, p. 12:

The Administrator's Interpretative Bulletin No. 14, '5(b). WHM 35:353, lists tobacco as an agricultural commodity.

King Edward employs many employees engaged in the "handling" of tobacco at wage rates less than 75 cents per hour (RK 16). Thus Petitioner has himself agreed that the employees here involved are engaged in "handling" tobacco, and "handling" is an operation specifically enumerated in Section 13(a)(10).

Elsewhere in the Record, it also appears that the em pleyees at both Respondent King Edward's and Respond ent Budd's packing plants are engaged in bulking, sliak ing, sorting, separating, grading, tving, and balling to bacco. . Supra. pp. 6-7; RB 141, 142, "Bulking" consists of piling and repiling the tobacco so as to permit it to ferment and dry. This activity extends over a period of some months. As for "shaking", during the bulking period the bulks are taken down from time to time and rebulked. In such process the leaves are "shaken out". "Sorting", "separating", and "grading" consist of dividing the fermented tobacco leaves into different classifica: "Tying" and "baling" consist of tying tobacco leaves together and putting the tobacco into bundles or packages. See pp. 6.7, supro, and also RK 92 and RB 42, 56. These operations fall squarely within the ordinary meaning of the terms "handling", "packing", "storing" and "drying" used in Section 13(a)(10).

Webster's New International Dictionary, Unabeldged Version, 1955 ed., defines such terms as follows:

Page 1133—"handling"—"a touching, controlling, managing, using, dealing with, etc., with the hand or hands, or as with the hands.

Page 1750—"packing"—"Act or process of one who or that which packs; esp., the putting up of meat, fruit, etc., for future sale.

Page 1750 "pack" ... to cover, envelop, or protect tightly with something. . . "

Page 2486 "store" [a verb with "stering" listed as the participle] " to deposit in a store, ware

house, or other building, for preservation; to ware-house, as to store goods. . . ."

Page 793—"dry"—[a verb with "drying" listed as the participle]—"... to free or rid from water, or from moisture..."

The operations here involved are not only within the "ordinary" or "common" meaning of the statutory language, but are also embraced in the technical meaning of the language, as understood by growers and agricultural processors. See Briefs for American Farm Bureau Federation and National Grange, et al., amici curiae herein. Congress undoubtedly intended that its language comprehend the technical as well as common meanings of the words used. Cf. Barber v. Gonzales, 347 U.S. 637, 641.

The Administrator's more elaborate definitions of the terms "handling", "packing", "storing" and "drying" are set forth in Appendix D, infra, pp. 108-109, and show also that the operations of bulking, shaking, sorting, separating, grading, tying and baling tobacco fall squarely within the language of Section 13(a)(10) describing the operations upon agricultural commedities which are exempt thereunder. Further, the Administrator's Release, M-12, issued in February, 1947, described the operations upon tobacco which are enumerated in Section 13(a)(10). See WHM 35:63-64. Such description, set forth in Appendix D, infra, p. 110, covers fully the operations performed by the employees here involved.

Petitioner's unsupported statement (Pet. &r., pp. 37-38) that the term "drying" does not include the bulking operation here conflicts with Interpretative Bulletin No. 14, 532; with the Administrator's Release M-12; and with the uncontradicted facts of record, showing that the bulking operation is indeed a "drying" operation (RK 49, 51, 52; RB 35, 42, 56). See also Circular No. 249; U. S. Department of Agriculture, p. 124, quoted at p. S. Supra. Thus, the Record shows that the natural internal trans-

formation of the leaf, which starts in the curing barn and continues in the packing plant-

"is a gradual and continuous process of drying and oxidation..." [Emphasis supplied] (RK 51);

and further that

"... the loss of moisture which is more rapid during the period of barn-curing on the farm continues throughout the period of bulk sweating in the warehouse, although at a slower rate. ... " (RK 52).

'And even the expert evidence, upon which Petitioner rehes so heavily, shows that in the packing plant—

"there is also a notable loss of moisture in the fermentation which often exceeds the loss in dry matter" (RK 27).

See also "Tobacco Shrinkages and Losses in Weight in Handling and Storage"; Circular No. 435, U. S. Department of Agriculture, pp. 30, 31, which shows that when the tobacco is first placed in the bulks, its moisture content ranges from 24 to 32 per cent, while subsequent to bulking the moisture content ranges from 18 to 20 per cent.

Petitioner's statement (Pet. Br., p. 38) that the moisture content of the tobacco is almost the same after bulking as before, finds no support in the Record. The expert evidence, as Petitioner agrees elsewhere in his brief (p. 5), shows only that the "initial content of moisture" in the bulk varies from 20 to 30 per cent, with a content of 25 per cent required for best results in the subsequent bulking (RK 24).

Petitioner's purported 1948 change in the interpretation concerning Section 13(a)(10) (Per. Br., pp. 48-49) is discussed hereinafter, pp. 71-72.

2. The decided cases also show that the employees here involved are engaged in performing operations enumerated in Section 13 (a)(10).

While there have been no decisions of this Court deal ing with the problem, the lower court decisions support Respondents' position concerning the scope of the Section 13(a) (10) exemption. See Prests Rese Total of Markets in a Cooperative Asset S. McComb. 181 F. 29 695. 698. 699; 701 702 (C.C.A. 1) exemption held applicable to emprocess of a cooperative association in Puerto Rico. engaged at several warehouses in operations identical with those of Respondents herein, namely, grading, weighing, bulking and packing (prior to enming) cigar leaf tobacco grownshy the cooperative's 7,000 members; Oquendo v. Alvarez d. Co., 6, Labor Cases [61,248] (D.P. Rico, 1942) - exemption held applicable to operations of grading, fermenting, storing and otherwise preparing for nurket eight leaf tobacro at warehouses operated by an independent com--pany, which bought the tobacco from farmers and trans ported it to the wavehouses; Sanabria v. Valiente d. Co., 9 Labor Cases 162,643 (D.R. Rico 1945) -exemption held applicable to employees engaged in handling, receiving, drying, fermenting, bulking, sorting, stripping, grading, packing and storing eight leaf tobacco at a packing establishment to which tobacco was brought from nearby farms. such operations being necessary for the preparation for market of such leaf tobacco; Rodrigue: v. Colon: 4 Labor Cases 569,361 (D.P. Rico 1941).—same; Maestre v. Cooper atica Cateteris, 6 Labor Cases 961,513 (D. P. Rico 1943) -exemption held applicable to employees of a company engaged in roasting; granding, and packing and canning coffee: Fliming v. Farmers Peanus Co., 128 F. (2d) 404; Halt . Rarnesville Farmers Elevator Co. 145 F. (2d) 250 (CCA ss) cert don 324 U.S. 858 exemption held an watchile, testing, grading, cleaning, staring and los Inc grain into radway cars for shipment: Tokin v. Flour Mills of America, 185, F. (2d) 596, 602 (C.C.A. 8) same. even though the grain elevators were owned by a coinpany which milled some of the grain into flour before marketing, it: Stephens v. College Product's Assu., 117 F. Supp. 517 (ND. 6a. 1953) exemption held applicable to a struck driver completive by a company, which soll chickens on behalf of farmers, who transported such chickens from shous to a nearly poultry processing plant, notwithstanding the shickens were there shoughtereds cleaned and dressed.

3. Erroneous arguments of Petitioner,

a). Petitioner argues (Pet. Br., p. 40) that tobacco bulking is a "manufacturing operation" in the course of which the tobacco is very substantially "changed from its 'raw or natural state" into an industrial product and is no longer an "agricultural or horticultural commodity". The Court of Appeals rejected this argument, stating:

"The legislative history of Section 213(a)(10) makes clear that its primary purpose was to prevent discrimination against the small farmer. When it is considered that admittedly the processing was essential for the marketing of the tobacco, again it seems clear to us that the employees of all the appellants are exempt under Section 213(a)(16-7) (RK 94-95, RB 163-164).

Petitioner's arguing it, moreover, conflicts with the statutory fanguage, the legislative history underlying Section 13(a) (10), and the facts of Record.

The words "in their raw or natural state" in Section 13(a) (10) are no separated by a column from the word

Petitioner seeks to convey the impression that Respondents' packing plant operations are complex, extensive and industrial (Pet Br., pp. 37-40). The facts of Record show otherwise Supra, pp. 7, 16. In any case Petitioner has bimself admitted that operations may be exempt under Section 13(a) (10), even though they are complex and industrial, e.g., packing and draing fruits. Interpretative, Bulletia No. 1, 1927, 32. Appendix D. p. 109 inten.

"preparing" but come immediately after that word. Hence, they modify only that word and not the words with which we are here concerned; namely, "handling", "packing", "storing", and "drying". If therefore, an employer is in fact performing any of these operations upon an "agricultural commedity"; he is performing an operation end-merated in Section 13(a)(10) whether or not such confinedity is then in its raw or natural state.

Petitioner virtually concedes (Pet. Br., p. 40) that the "raw or hatural state" limitation in Section 13(a)(10) applies only to the agrivity of "preparing". He argues, however, that such limitation is inherent in the term "agricultural or hericultural commodities". But if this were true, Congress would not have included the limitation expressly as so the single activity of "preparing" and have insulated as to all the other activities entimerated in Section 13(a)(10).

Perference's argument as to the meaning to be ascribed to the torm 'agricultural's a commodities' is also directly contrary to the legislative history of Section 13(a) (16). That history, reviewed intra, pp. 69, 82.88 and Agreedix E. pp. 111-119, shows that as the exemption was first narradiced in the Senate, it was limited to the operations of preparing, packing and storing tresh fruits and vegetables in their raw or natural state (81 Cong. Rec. 7876, 7949). Later, the exemption was broadened to include these operations upon all agricultural commodities in their raw, natural or draw state (82 Cong. Rec. 1783-1784; H. Rept. No. 2182; 75th Cong. 3d Sess., p. 2). And finally, it was broadened still further by the adoption in the Hause of the so-called Hiermann amendment, which

Petitioner's suggestion (Pet. Br., p. 41. ote 16), that Congress' failure to have the "raw or natural state" limitation modify all of the preceding operations in Section 13(a (10) was "inadvertest"; is clearly inconsistent with the legislative history of Section 13(a)(10). Infra, pp. 69:82-88, 111-119.

contained language very much like that in Section 1350 (10) as finally emerced (83 Coop. Rec. 7401, 7407,7408). In the face of this history, which shows that Congressarted with a narrow exemption limited to operations upon fresh fruits and vegetables in their raw or natural state and continuously broadened the exemption as the bill worked its way through to passage, no basis exists for restricting the phrase "agricultural commodities" to the narrow meaning which Petitioner would ascribe to it. In the absence of any special statutory definition, the phrase should be given its commonly understood meaning. Addison y. Holly Hill Fruit Products, 322 U.S. 607, 618. Within such common meaning, tobacco, although fermenfed, is still an agricultural commodity.

Petitioner's argument is also in conflict with the pure pose of Section 13(a)(10) to exempt workers "engaged" in processes necessary for the marketing of agricultural products" (Addison v. Holly Hill Fruit Products, 322 U.S. 607, 612) and particularly the first processing of things that come off the farm" (83 Gong. Rec. 7401, intra, .. pp. 69, 86; 116). As held by the Court of Appeals below (RK 94), the packing plant operations here are necessary before the type tobacco involved can be marketed, and they constitute "first processing" operations performed upon the tobacco after it comes from the farm. Consequently, a holding that the exemption does not apply because the tobacco is not in its "raw or natural state", when worked on in the packing plant, would deny the exemption to all tobacco packing plants handling this particular type of tobacco. This would clearly Violate the Congressional purpose.

The dissenting opinion in Holly Hill also notes, concerning the operations included in Section 13(a)(10): "All can be done on the farm and frequently are done there, but may be deno elsewhere, often in factories: All consist in the first stages of preparation for market", 322 U.S. at 626.

But even if the "raw or natural state" limitation applies to the operations here in question and if tobacco is deemed an "agricultural commodity" only if its is in its raw or natural state, the Record establishes clearly that the activities of the employees here involved are still within Section 13(a)(19). The only case in point holds that the Termenting of eigar leaf tobacco through the bulking process at tobacco packing plants does not change the "raw or natural state" of the tobacco. Puerto Rico Tobacco Marketing Coop.; Ass'n. v. McComb. 181 F.(2d) 697, 702 (C.C.A. 1). And the U.S. Court of Appeals for the Fifth Circuit has said that "raw" as used in Section 13(a) (10) means "uncooked", and that a "natural" state is one that has not been artificially changed. Fleming v. Farmers Peanut Co., 128 F.(2d) 404, 407. The fermentation of tobacco there is not a cooking process nor does it involve any artificial change in the tobacco. The chemical changes within the tobacco occurring in fermentation are but natural and spontaneous changes within the tobacco leaves, without the addition of external elements or chemical catalysts. Actual fermentation of tobacco leaves may in fact be likened to ripening of fruit, which also produces chemical changes: Yet surely no one would contend that the ripening of fruit at a plant, to which the farmer's product is taken, so changes the fruit's raw or natural state. Section 13(a)(10). See in this connection the Puerto Rico Tobacco Marketing Coop, case, cited supra.

b) Petitioner's brief (pp. 42-44) erroneously relies upon the Congressional rejection of amendments exempting to-backs anction warehouses. The amendment introduced on this subject in the Senate was a self-contained amendment providing exemption from the operation of the entire statute rather than directed to the "area of production" exemption (SI Cong. Rec. 7878; Pet. Sep. App., p. 100). And in the House the only amendment of those referred to by

Petitioner, which was directed to that exclusion, was the offered by Congressman Cooley, on May 24, 1938 (83 Congres, 7408; Pet. Sep. App., p. 125), after the House has already adopted the Biermann amendment as a size that for such exemption as reported in the House. Infra. pp. 85-86, 115-119. Hence, contrary to Petitioner's assertion. (Br., pp. 19, 52) neither the Senate nor House affectioner referred to by him were offered as amendments provision which subsequently became Section 13(a) (10) Eurthermore, operations in tobacco ancien warehouse. do not involve. Type 62 tobacco and are distinguishable, to gally and functionally, from the bulking operations here presented Supra. p. 35, note 18. Non-citar tobacco is marketed by the farmer through such auction wares houses immediately after curing and grading in the barn on the farm. Following the auction sale, such tobacco is shipped to re-drying plants operated by the purchaser. See pp. 55-56, supra. In contrast, Type 62-tobacco "cannot be graded until it has been processed" in the packing plant; and "there is no market at an. earlier stage for this type tobacco". Consequently, the operations in the packing plant on Type 62 tobacco are essential to prepare it for market (RB 162, 164; RK 92, 94). Accordingly, as Petitioner concedes (Br., pp. 43) 44). He amendments relating to auction wavehouses, even here involved: Moreover, the Administrator himself reported to Congress on January 3, 1949 that employed in "tobacco-auction warehouses" were exempt from join imum wage and over me requirements by reason of tion 13(a)(10), presumably if they were within the of production. See 1948 Appeal Report Water and H. and Public Contracts Divisions 1. S. In

Non can Respondents' plants be likened, as Petitioner suggests (Per. Lr. p. 38) to redsving plants. We have previously pointed but, pp. 55.56, supra, the essential differences between Respondents' plants, and redrying plants. Moreover, even as to pedrying plants, Petitioner's statemore that the inapplicability of Section 13(a)(10) to such. plants has long been accepted by the industry, is open to question. The Administrator, in his findings published in connection with his garen of production" definitions; recognized that such plants do perform operations described in Section 12(a)(10), for in such findings he referred to the fact that representatives of the tobacco redrying industry had opposed a mileage criterion (Pet. Sep. App., p. 27). If redrying plants do not perform operations in Section 13(a)(10), it would have been unnecessary for the Administrator to discuss their opposition to a mileage test or any other test in the "area of production" definition.

Petitioner also relies upon the fact that Congress ultiinately included in Section 13(a).(10) specific mention of . "ginning and compressing", while it did not mention tobacco processing (Pet. Br., pp. 44-45). This argument begs the question We contend that the operations here involved are embraced by the words "handling", "packing", "storing" and "drying" "agricultural . . . commodifies". Petitioner does not disprove our contention by pointing out that other words in Section 13(a)(10) exempt other operations. In this connection it will be observed that "cheese or butter or other dairy products" are the only agricultural or horticultural commodities mentioned in terms in Section 13(a)(10). (All other agricultural or horticultural commodities, whether they be cotton, tobacco, fruits or vegetables, eggs, buts, etc., are included generally in the term "agricultural or horticultural coromodities" and operations thereon are exempt or non-exer of depending upon the operation in question.

Petitioner also relies upon the omission from Section 13(a)(10) of the word "processing". Pet. Br., pp. 45-46). But Congressman Biermann, the spons real Section 13-a) (10), elearly explained why the word "processing" was excluded:

"In an amendment I inserted in the Record vester, day I included the word processing. I call attention to the fact that in the pending Educadment this word is stricken out. I struck it out for the reason that some Members thought that processing would include the making of cotton and wood into textiles, and richs ber into finished products, and a long list of things of that kind. The amendment I have offered includes only the first processing of things that come off the farm. [Emphasis supplied]. (83 Cong. Rec. 7401).

Plainly then the omission of the word "processing" was simply to make sure that manufacturing operations were excluded from Section 13(a)(10). It was not intended to preclude the exemption of operations such as those here involved which are govered by other words in Section 13(a)(10), designed to embrace "the first processing of a things that come off the farm". Furthermore, this Court itself referred to Section 13(a)(10) as providing an exemption for "various processing operations." Waidhat, 349 U.S. at 267.

c). Petitioner argues that since the operations here involved constitute first processing within the meaning of the limited overtime exemption granted by Section 7(c), they cannot be deemed included under Section 13(a) (10). (Pet. Br., pp. 46-48):

But if these are "first processing" operations, then as stated by Congressman Biermann, they were intended to be wholly exempt under Section 13(a)(10). Lutya. pp. 86, 116. Furthermore, there are many operations which Section 7(c) specifically exempts and which Section 13(a)(10) also specifically exempts. viz. the ginning and compressing of cotton, the first processing

essing (including daying see Interpretative Bulletin No. 11, 519, WHM 35:359), canning or packing fresh fruits or vegetables. True, the Section 7(c) exemption for these operations is not restricted to employees employed within the Zarea of production"; but to the extent that employees are engaged in these operations within the Tarea of Production, it is plain that the Sections 7(c) and 13(a) (10) exemptions overlap.

· As the Court below stated;

we agree with the Ninth Circuit that such exemptions [Sections 7(c) and 13(a)(10)] overlaps and are not alternative or mutually exclusive. Waisalua Agricultural Co. v. Maneja, 9th Cir., 178 F.(2d) 603, 609" (RK 95).

In his findings preceding the issuance of his area of production definitions, the Administrator pointed out that many establishments did not need any Section 13:

(a)(10) exemption because "most affected industries have 14 weeks, 28 weeks and in some instances year-round exemptions from overtime under other provisions of the Act" (Pet. Sep. App., pp. 13-14, note 1.) The Administrator was here plainly referring to Section 7(c) of the Act, thus again recognizing that Sections 13(a)(10) and 7(c) do overlap. And in his 1948 Annual Report to Congress, gp. 124-128, the Administrator stressed such overlapping, including overlapping as to operations on tobacco (Table 24, pp. 126-127). In his 1950 Annual Resport: p. 288, he again recognized such overlapping.

With respect to the part of Section 7(c) which is restricted to employees within the "area of production", namely, first processing of agricultural commodities, that exemption and the exemption in Section 13(a)(10) overlap in many respect besides tobacco. Thus, for example, the drying of furs or hay is the first processing of an agricultural commodity within the meaning of Section 7(c) and also constitutes the drying of an agricultural

commodity within the meaning of Section 13(a)(10). Interpretative Bulletin No. 14, 19 20, 32.

d). Petitioner contends that his interpretation, which he terms of long standing, was ratified by the 1949 amendments to the Act (Pet. Br., pp. 48-49). This contention is wholly without merit.

First, unlike the situation referred to in Waialia 349 U.S. at 269-270, where the Administrator reported to Congress a changed interpretation in the agriculture exemption concerning milling of sugar cane, and Congress took to action with respect to such changed interpretation, the interpretation of Section 13(a)(10) which the Petitioner advances here was never reported to Congress.

Second, as late as 1948, the Administrator, submitted a chart to a Senate Labor Subcommittee defining the term "drying" in Section 13(a)(40) as "lowering moisture content of agricultural commodities such as fruits, vegetables, hay, and unstemmed tobacco by ext sure to heat or by natural methods." Heavings on S. 49, Senate Comm. on Labor and Public Welfare, 80th Cong. 2d Sess., p. 86; WHM 35:715,719. And the Administrator's Annual Report for 1948, transmitted to Congress on January 3, 1949, described the term "handling" in Section 13(a)(10) as including "assembling, binning, piling, stacking" (Table 24, p. 126). Neither of these submissions to Congress in 1948-1949 questioned that tobacco bulking was embraced in the exemption.

Petitioner asserts (Pet. Br., p. 48, note 19) that while there may have been some confusion in the original interpretation issued in August, 1939 (Interpretative Bulletin No. 14), subsequent published interpretations made it clear that tobacco bulking was not regarded as an operation exempt under Section 13(a)(10). He refers in this connection to a Department of Labor document entitled "Area of Production". Tobacco", dated December

21944, but he gives no citation of where it may be found. >-If it was issued, it was not by any means called to the attention of employers, employees and the public generally, Moreover, in Release M-12, quoted infra. Appendix, D, p. 110, issued in 1947, and in the testimony, charts or reports in 1948-1949 above described, the Administrator indicated that the operations here involved are among those which are enumerated in Section 13(a)(10). The interpretation which Petitioner now advances was published no earlier than November 1948, and then only as an indirect comment in a changed regulation directly concerning Puerto Rico tobacco (Pet. Br., p. 49),36 Even this comment was never reported to Congress by testimony or annual report. In these confused circumstances, Congress can hardly be said to have ratified the alleged change in the Administrator's long-standing interpretation to the contrary.

Third, Congress considered Section 13(a)(10) in its 1949 review of the Act only in connection with the problem of defining the "area of production" and not in connection with the problem of what activities are exempt under Section 13(a)(10). See conference report on 1949 Amendments, H. Rep. No. 1453, 81st Cong., 1st Sess., p. 28; Pet. Sep. App., pp. 133-153. For this reason also, Congress cannot be deemed to have ratified the administrative construction of the activities included in Section 13(a)(10).

was enacted, the Administrator had outstanding a special definition of "area of production" for Puerto Rican leaf tobacco, wherein the operations of bulking and fermenting tobacco were considered operations described in Section 13(a)(10). 3 CCH Labor Law Reporter, *23281, note 1.

B. RESPONDENTS' EMPLOYEES AT THEIR PACKING PLANTS ARE ENGAGED IN HANDLING, PACKING, STORING, AND DRYING AN AGRICULTURAL COMMODITY "FOR MARKET",

The District Court found that the activities taking place in the Respondents' packing plants were to "ready [the tobacco] for market" (RK 58, RB 148), and constitute preparing the tobacco "for market" (RK 59, RB 148) [Emphasis supplied]. The Court of Appeals also found that such packing plant activities were "essectial for the marketing of their [the farmers'] crops" and constituted "preparation for market" (RK 93, 94; RB 163, 164) [Emphasis supplied]. Moreover the undisputed facts in the Record show that all of the tobacco prepared. at the packing plants by Respondents' employees is sold to cigar manufacturers (RK 49, RB 60). Clearly then, the work of the employees at the packing plants upon the tobacco is "for market" within the meaning of Section 13(a)(10). See Tohin v. Flour Mills of America, 185 F. (2d) 596, 602 (C.C.A. 8) and Stephens v. Cotton Producers Ass'n., 117 F. Supp. 517, 522-523 (N.D. Ga. 1953).

The Administrator's authority under Section 13(a)(10) to define "area of production", and thus to draw the lines for the exemptions granted by that section, must be exercised within the limits laid down by Congress. The courts,

C. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE ADMINISTRATOR'S DEFINITION OF "AREA OF PRODUCTION" IS INVALID AS APPLIED TO THE FACTUAL SITUATION HERE TO THE EXTENT THAT IT EXCLUDES THE TOWN OF QUINCY, FLORIDA; AND SINCE THE RESPONDENTS' EMPLOYEES HERE INVOLVED ARE OTHERWISE WITHIN THE SECTION 13(a)(10) EXEMPTION, THE COURT PROPERLY ORDERED JUDGMENT FOR RESPONDENTS.

^{1.} The population requirement in the definition is an invalid non-geographic limitation as here applied.

for example, will not enforce his definition if he includes therein non-geographic limitations. Addisoner. Holly Hill Fruit-Products; 322 U.S. 607, 618-619.

The Administrator's definition of "area of production" as used in Section 13(a)(10) is set forth in Appendix A, infra, pp. 96-98. Under such definition a tobacco packing plant is within the "area of production" if (a) 95 per cent of its tobacco comes from farms or farm assemblers located not more than 50 airline miles from the packing. plant, and (b) the packing plant is located in a town of under 2500 population and more than I airline mile of any city or town with population ranging from 2500 to 49,999, more than 3 airline miles of any city or town with population ranging from 50,000 to 499,999, and more than 5 airline miles of a city with a population of 500,000 or greater. Respondent King Edward's packing plant draws all of its tobacco from farms not more than 13: miles away and Respondent Budd's packing plant draws all of its tobacco from farms not more than 30 miles away, supra, pp. 6, 10, and thus satisfy the first of the requirements in the Administrators' definition. This is indeed a geographic requirement. Respondents do not satisfy the second requirement, however, because they are located in Quincy, a town of over 2500 population.

We submit, however, that as applied here such second requirement is a non-geographic limitation, which is unauthorized by Congress. Not only has the court below thrice held the population limitation to exceed the Administrator's guthority. but other lower courts also have held invalid a like population limitation in an earlier "area of production" definition.

³⁷ RK 93; RB 163; Jenkins v. Durkin, 208 F. (2d) 941, 945; Lov-vorn v. Miller, 215 F. (2d) 601.

³⁸ Lake Wales Citrus Growers Ass'n. v. Andrews, 1 Labor Cases [18,429] (S.D. Fla. 1939) rey'd. on other grounds 110 F.(2d) 653 (C.C.A. 5); Eleming v. Farmers Peanut Co., 37 F. Supp. 628

In Addison v. Holly Hill Fruit Products, 322 U.S. 607, this Court considered the validity of the Administrator's "area of production" definitions. At that time there were two alternative definitions. One definition included individuals within the "area of production" if they were comployed in an establishment located outside any town or city of 2500 or greater population and the establishment obtained all of its products from farms within ten miles. The other definition required that the establishment employ not more than seven employees and that it obtain all of its materials from farms in the general vicinity. This Court found it unnecessary to pass upon the validity of the population limitation in the first of the two definitions because the Company's canning plant there involved was in a town of under 2500 and therefore met the limitation. The Company was not exempt under the first definition, however, because some of its products came from beyond ten miles of its plant. 322 U.S. at 610:611.

As for the second definition the Court struck down as unauthorized the number-of-employees limitation: 322;U.S. at 618. It said in that connection that Congress.

":... restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him". 322 U.S. at 619.

As pointed out by Judge Pickett, dissenting in Tobin v. Traders Compress Co., 199 F.(2d) 8, 12 (C.C.A. 10); cert. den., 344 U.S. 909, reh.g. den. 344 U.S. 931, 59 this

⁽M.D. Ga. 1941) aff'd. on other grounds 128 F.(2d) 404% (C.C.A. 5); Clark v. Jacksonville Compress Co., 45 F. Supp. 43 (E.D. Tex. 1941).

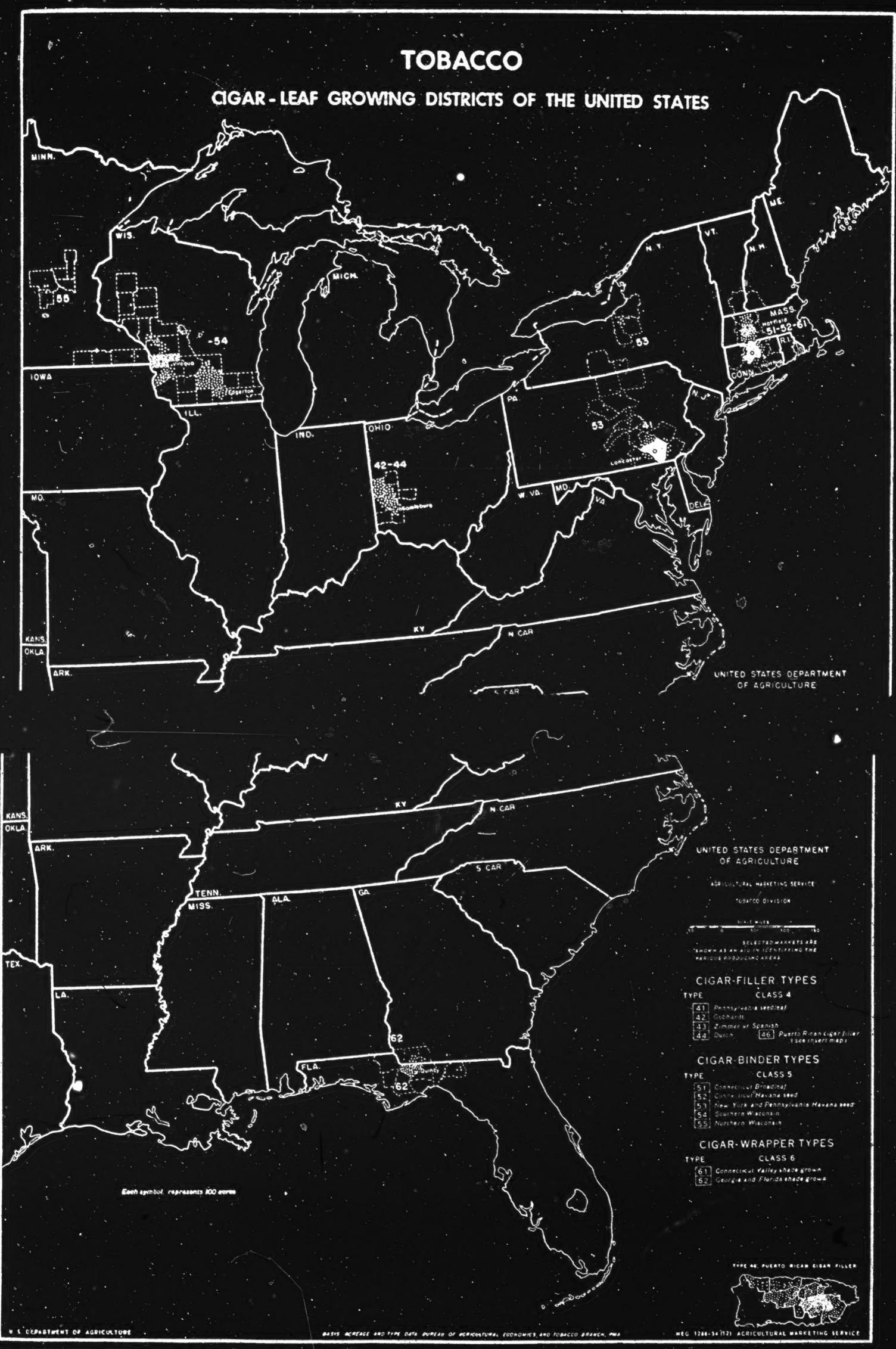
Tenth Circuit upheld the validity of the present "area of production" definition as applied to a cotton compress establishment located in a city of over 30,000 and drawing a substantial percentage

means that the Administrator may take into consideration "all relevant economic factors" necessary to determine the geographic lines of the area of production. But where, as here, a plant is within the geographic lines established, no reasonable basis exists for discriminating against it because it is located in a town of 2500 or more population.

2. The Record shows that Respondents' packing plants are geographically within the "area of production" of Type 62 tobacco.

The facts here establish clearly that Respondents' packing plants are within the geographic lines of the "areaof production" for Type 62 tobacco, under any rational definition of that term. Quincy, where the plants are located, is a small agricultural community of some 6500° and the plants draw all their tobacco from farms in an immediately adjacent and compact area, not more than 30 miles distant from the packing plants. Furthermore, 60 per cent of the five million pounds of tobacco grown annually in that area are bulked in the tobacco packing plants in Quincy. And still further, 60 per cent of all Type 62 tobacco grown in Gadsden County, Florida, where Quincy is located, is processed in tobacco packing plants in Quincy, and largely by the same employees who grow it. Supra, pp. 9, 10, 11; RB 36. There is other evidence as well, of which this Court will take judicial notice, that Quincy is in the very heart of the growing area of U. S. Type No. 62 tobacco. See the U. S. Department of Agriculture map reproduced on the opposite page, and also that Department's definition of the term.

of its cotton from distances of more than 50 miles—in fact up to 250 miles. See the District Court decision in that case at 107 F. Supp. 354, 358-359 (E.D. Okla.). That case is thus clearly distinguishable on its facts from the situation here. Cf. Armour V. Wantock, 323 U.S. 126, 132-133.



Map reproduced from Statistical Bulletin No. 157, U. S. Dept. of Agriculture, Annual Report on Tobacco Statistics, 1954, p. 8.

"production area" for Type 62 tobacco in a marketing order regulating the handling of such type tobacco pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (48 Stat. 31, as amended; 7 U.S.C. Sec. 601 et seq.). The Secretary of Agriculture's definition includes in such "production area" those counties bordering the Georgia-Florida state line and lying between the Suwanee River on the east and the Flint and Apalachicola Rivers on the west. 17 Fed. Reg. 3509; see also 17 Fed. Reg. 3501 and 3502 (April 19, 1952). Gadsden County in Florida is but one of such counties.

In the light of these facts the court below correctly observed

"It seems particularly clear that the Administrator did exceed his authority as to the area of production involved in this particular case" (RK 93, note 7; RB 163, note 7).

Assuming arguendo the propriety of a population limitation in the area of production definitions, the Administrator exceeded his authority when, in the light of the foregoing facts, his population limitation was made so inflexible as to exclude Respondents' packing plants in Quincy. The facts in this case show plainly the necession

⁴⁰ Petitioner suggests (Pet. Br., p. 34) that Congress, when considering the 1949 Amendments to the Act, could easily have advised the Administrator to adopt the Secretary of Agriculture's definition. But since that definition applied only to Type 62 to-bacco, and there are many other types of tobacco as well as hundreds of other agricultural commodities, this suggestion is hardly feasible.

⁴¹ Petitioner relies upon the various hearings and conferences held by the Administrator before promulgation of the present "area of production" regulations in 1946 (Pet. Br., p. 24). Petitioner admits however, that its records do not show that any of the producers of Type 62 tobacco appeared at any hearing; that any evidence was taken pertaining to the growing of such tobacco; or that the Administrator had any evidence specifically in connection with Type 62 tobacco (RB 50). The problems of Type 62 to-

sity for a deviation from the inflexible 2500 population test for Type 62 tobacco, just as the Administrator's area of production definitions recognized the need for and established different mileage limitations for different commodities and different operations, and varying distances from populated places varying with the size of population. (Appendix A, pp. 96-98, infra). Whatever the validity of the 2500 population test in distinguishing for some purposes between rural and urban areas, it should not be established inflexibly to exclude from the "area of production" plants such as Respondents' which by all other criteria are clearly within the area of pro-

bacco were not specifically heard by the Department of Labor until after suit was commenced against the independent packer, Budd, in February 1951 (RB 146; Pet. Br., pp. 25-26; see also U. S. Department of Labor, Wage and Hour and Public Contracts Divisions, "In the Matter of the Amendment of the Definition of 'Area of Production' As Used in Sections 7(c) and 13(a)(10) of the Fair Labor Standards Act, As Amended", Volume II, pp. 356, et seq. (April 4, 1951). And even at that time, the Administrator simply took the erroneous position that he did not have to concern himself with Type 62 tobacco because the bulking operations here involved are not among those enumerated in Section 13(a)(10). See Report and Recommendations of Presiding Officer, U. S. Department of Labor, Wage and Hour Division, G-617, p. 7, dated June 9, 1954:

"... the Administrator's position [is] that the 'bulking' of cigar leaf tobacco is not among the operations enumerated in Section 13(a)(10). Under these circumstances, regardless of the definition of 'area of production', the Administrator is without authority to consider employees engaged in bulking [Type 62] cigar tobacco exempt under Section 13(a)(10)."

⁴² In such definitions, the mileage limitation as to ginning cotton is 10 miles; as to operations on fruits and vegetables, 15 miles; as to storing cotton, 20 miles; as to compressing cotton and operations on tobacco, grain, soybeans, poultry and eggs, 50 miles; and as to operations on other unspecified commodities, 20 miles.

The definitions also exclude from the "area of production" any operation within 1 mile of a city, town, or "urban place" having 2500 or more population; within 3 miles of such place having 50,000 or more population; and within 5 miles of such place hav-

ing 500,000 or more population.

duction of Type 62 tobacco. The tobacco packing plants in the Quincy area employ 1636 workers (RK 84A, 86). And the town must have retail stores, service establishments, and public facilities to meet the requirements of these employees, and so Quincy's population exceeds 2500. But, this should hardly be sufficient reason for excluding plants in that town from the area of production of Type 62 tobacco, when all other facts point to Quincy's being squarely within such area.

3. The Record also shows that the population requirement has the effect of defeating the purpose underlying the "area of production" exemption.

The Record convincingly demonstrates that the population limitation in the regulation as here applied thwarts the Congressional purpose in enacting the "area of production" exemption. This Court pointed out in the Waialua case that

"This exemption was designed to meet the protests of many legislators who argued that the broad agriculture exemption permitted large farming units to process their own products without subjecting themselves to the terms of the Act, while the small farmer,

⁴³ As the Record shows (RK 84A), 15 packing plants are located in the Quincy area; 11 are in Quincy, 3 on farms and 1 in Madison, Florida, which has a population of 3,150 according to the 1950 U.S. Census. Hence, a redefinition of "area of production" that included Quincy and Madison within the "area" would exempt fewer than 1,600 employees, since those working in packing plants on farms are probably already within said "area".

⁴⁴Cf. Maneja v. Waialua Agricultural Company, 349 U.S. 254, 258, in which the large Hawaiian sugar plantation there involved had built on its plantation a village to serve the needs of the required number of plantation employees and their families. Over 3000 persons lived in this village which contained dwelling houses and also the usual retail and service establishments as well as public services. The entire plantation, including the village, was within the city limits of Honolulu. See the Record in that case, No. 357, October Term 1954, pp. 118-122, 31.

who did not have the equipment necessary for such processing, had to bear the cost of operations covered by the Act" [Emphasis supplied]. 349 U.S. 254, 268.

As found by the Court of Appeals, many small farmers in the Quincy area grow less than 25 acres of Type 62 tobacco per year. And this is insufficient for them to process their own tobacco; accordingly they have it prepared for market by an independent company, e.g., Budd (RB 162, 36). This is precisely the type of case to which Congress intended to accord an exemption under Section 13(a)(10). Since the population limitation in the Administrator's definition has the effect of denying the exemption in the situation here which was plainly embraced by the Congressional intent, such limitation was properly invalidated by the court below.

The Administrator himself has recognized that the purpose of Section 13(a)(10) does not require the inclusion in the "area of production" definition of any population limitation. Thus, both in the original definition promulgated in 1938 and for six years from 1941 to 1947, the "area of production" was defined solely in terms of a number of employees limitation, although for the period 1939-1940 the definition included a population limitation. (Addison v. Holly Hill Fruit Products, 322 U.S. 607, 609-610; 1941 WH Man., pp. 306-309; Pet. Sep. App., pp. 10-11). Effective in 1947 (11 Fed. Reg. 14648), however, the population limitation was abandoned, as Petitioner states (Pet. Sep. App., p. 11)

"when industry representatives protested that it resulted in numerous competitive inequalities and economic discriminations between establishments located within the 'area of production' as so defined, and those outside the 'area of production'."

It was not until after this Court in the Holly Hill case struck down as invalid the number of employees limitation in the definition that the Administrator once again included a population limitation in the definition (Pet. Sep. App., pp. 10 et seq.), although he continued to believe such limitation created economic discriminations and competitive inequalities which were basically unfair. Pet. Sep. App., pp. 39-40; Hearings on S. 49 and other bills, Sen. Comm. on Labor & Public Welfare, 80th Cong. 2d Sess., p. 82; Administrator's Annual Report to Congress, 1954, pp. 36-38. Since the Administrator deliberately reinserted a population limitation in the definition in the circumstances above explained, he had the burden of providing such flexibility in the population limitation as to avoid gross discriminations which Congress had never authorized. Certainly that burden has not been sustained herein. Cf. Secretary of Agriculture et al. v. United States, 350 U.S.—(decided January 9, 1956), 24 LW 4039.

Furthermore, the petition for certiorari herein (pp. 14-15) stresses the competitive disparities between processing establishments in different circuits, which uphold or invalidate the population test. Here, however, Petitioner condones the extraordinary situation that would be created in the small town of Quincy, where the farmer packing his own tobacco in that town is exempt under Section 13(a)(6), if the independent packer down the street, packing the tobacco of numerous nearby small farmers, were not exempt under Section 13(a)(10). The District Judge recognized the disastrous consequences of this result for the small farmers (RK 37, 56-57; RB 146-147), but attempted to resolve the disparity by denying exemption even to the farmer-packer, contrary to the clear mandate of Sections 13(a)(6) and 3(f) (RK 37, 56-57, 59-60; RB 146-147, 149-150). The Court of Appeals properly reversed this attempt to avoid erring under one exemption by erring under another. The Court of Appeals construed each exemption in the only way possible to effectuate the Congressional mandate as to both exemptions (RK 93, 94, note 8; RB 163-164, note 8).

Petitioner argues (Br., pp. 32-35) that Congress in effect approved the Administrator's definition of "area of production" by failing to amend Section 13(a)(10) in 1949. The legislative history of the 1949 Amendments to the Act Pet. Sep. App., pp. 133-153) shows serious objections in both the House and Senate to the Administrators' definition; and each House adopted a different amendment to correct this situation.. (Pet. Sep. App., p. 133; H. Rep. No. 1453, 81st Cong., 1st Sess., p. 29 (Conference Report on 1949 Amendments).) Although the conferees did not em, body either of these amendments in the final bill, the legislative history as a whole refutes the argument that Congress was ratifying the Administrator's definition. And in any case, where, as here, the law is plain, failure to amend does not constitute adoption of an administrative definition which departs from the plain meaning of the statute. Cf. Wong Yang Sung v. McGrath, 339 U.S. 33, 47; Helvering v. Hallock, 309 U.S. 106, 119-120; Brannan v. Stark; 342 U.S. 451, 465. The statistory language and purpose are paramount. See Addison v. Holly Hill Fruit Products, 322 U.S. at 618; Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 64; Jewell Ridge Coal Corporation v. Local 6167, 325 U.S. 161, 169; Hilton v. Sullivan, 334 U.S. 323, 338-339. Nor can Petitioner derive any comfort from Section 12 of the Portal to Portal Act of 1947, 29 U.S.C. 251, 261 (Pet. Br., p. 35). As Petitioner states, that section of the Portal Act simply provided exemption from liability that might have been incurred by retroactive application of the "area of production" definition here involved.

4. The legislative history of Section 13(a)(10) 45 shows

⁴⁵ Here again, as in the discussion of the Section 13(a)(6) legislative history, the bills in their various forms referred to in this

also that the population limitation in the sarea of production" definition is invalid as here applied.

(a). Senate Proceedings.

We have already pointed out, supra, p. 30, that S. 2475, which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. Neither as introduced nor as reported by the Senate Committee on Education and Labor was there any provision comparable to Section 13(a)(10). S. 2475, as reported in the Senate on July 6, 1937, Calendar No. 905, 75th Cong., 1st Sess.

In debate on the floor of the Senate, Senator Copeland suggested that the exemption for agricultural workers should be extended to include "pregaring for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities". S1 Cong. Rec. 7656.

Later, Senator Schwellenbach, to whom this Court has referred as "one of the most ardent advocates of equalization in the status of large and small farmers" under the Act (see Waialua, 349 U.S. at 268), offered the following amendment:

"The term 'person employed in agriculture," as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, packing, or storing such fresh fruits or vegetables in their raw or natural state." 81 Cong. Rec. 7876.

Since the bill already exempted "persons employed in agriculture", the effect of the amendment was to extend o

discussion of the Section 13(a)(10) legislative history are collected in "Senate Bills, 75th Cong. 1937-38, Vol. 13, 2401-2550, J-50-2d Set" (Library of Congress). See note 15, p. 30, supra.

the exemption to the additional persons embraced in the amendment.

Senator Schwellenbach explained that the purpose of his amendment was to "make it possible for the small fruit and vegetable producer [who does not have his own processing equipment] to operate upon the same basis as the large fruit and vegetable producer [who does have his own processing equipment and is exempt under the agriculture exemption]". 81 Cong. Rec. 7876. He further explained that the farmer bears the cost of the work and therefore no higher costs should be imposed upon the plants preparing the farmer's crop for market. Id., 7877.

Senator Connally asked whether the largest applepacking plant in the world, located at Winchester, Virginia, right in the heart of a great apple-producing region, would be exempt. Senator Schwellenbach replied that "if the work done in that plant is as described in the amendment, it would be exempt". *Id*.

Senator Schwellenbach's amendment was adopted (81 Cong. Rec. 7949) and the bill passed by the Senate on July 31, 1937, contained that amendment. 81 Cong. Rec. 7957.

The purposes of the amendment, as stated by Senator Schwellenbach, i.e., to equalize the status of the large and small farmers under the Act so that each could have their products processed for market by employees exempt from the Act and to spare the farmer additional costs, can only be served if the exemption applies notwithstanding the processing plant is located in a town of over 2500 population. And in any event, as already noted, Senator Schwellenbach recognized that the world's largest apple packing plant would be exempt, even though located in Winchester, Virginia, a city with a population of over 10,000 according to the 1930 U.S. Census and

over 12,000 according to the 1940 U.S. Census. So too a town like Quincy with a population of only some 6500 may not be excluded from the "area of production" simply because of its size.

Pertinent portions of the debates in the Senate on the area of production" exemption are set forth in Appendix E, pp. 111-113, infra.

(b). House Proceedings.

The bill after passage in the Senate went to the House and was referred to the House Committee on Labor. As reported by that Committee on August 6, 1937, the bill contained the Schwellenbach amendment as passed in the Senate. Sec. 2(a)(29), S. 2475 a reported, Union Calendar No. 535, 75th Cong., 1st Sess., p. 8; H. Rept. 1452, 75th Cong., 1st Sess., p. 12.

As previously stated, supra, p. 37, the Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill by petition of the House membership. On the floor of the House, amendments offered by Congressman Lea and Lucas were adopted, which extended the Schwellenbach amendment to all "agricultural commodities" "in their ray or natural state". 82 Cong. Rec. 1783-1784. The debates on such amendments are set forth in Appendix, E. pp. 113-115, intra. But then on December 17, 1937, the bill was recommitted to the Labor Committee.

On April 24, 4938, another draft of S. 2475 was reported to the House. That draft exempted "any employee employed in agriculture" and also defined "employee employed in agriculture" as including

"... individuals employed within the area of production, engaged in storing for the farmer, preparing (but not commercial processing), or packing agricultural or horticultural commodities in their raw. natural or dried state, but does not include employees of transportation contractors engaged in transportation of farm products from farm to market". Sec. 3(g), S. 2475, 75th Cong., 3d Sess., reported with amendment, Union Calendar No. 804, p. 50; H. Rept. 2182, 75th. Cong., 3d Sess., pp. 2, 8.

This bill thus not only incorporated the Schwellenbach amendment, as broadened by the Lea-Lucas amendments to cover all "agricultural commodities" and not simply "fresh fruits or vegetables", but it also extended the exemption to such commodities in their "dried" state as well as in their "raw or natural state".

In floor debate Congressman Biermann introduced an amendment, substituting for Sec. 3(g) the following:

"'Employees engaged in agriculture' includes individuals employed within the area of production, engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter." 83 Cong. Rec. 7401.

Congressman Biermann explained that his amendment was not intended to exempt factories (83 Cong. Rec. 7401) and included only the "first processing of things that come off the farm" (Id.) He added that "the important point is that the farmer pays the bill for this processing" (Id.).

The Biermann amendment was adopted (83 Cong. Rec. 7407-7408) and the bill passed the House on May 24, 1938, containing such amendment. 83 Cong. Rec. 7449-7450.

Pertinent portions of the debates on the Biermann amendment are set forth in Appendix E, pp. 115-119, infra.

(c). Conference Report.

The Conference Report retained the Biermann Amendment but made the following changes in it: (a) the amend-

ment was transferred from the definitions section of the bill to the exemptions section; (b) the Administrator was given authority to define "area of production"; and (c) the making of dairy products was included within the terms of the amendment. 83 Cong. Rec. 9249, 9255.

(d). Conclusion on Legislative History.

The debates in both Senate and House show clearly that it was the purpose of Congress to protect against increased costs the small farmer who did not have his own processing plant, and to equalize the status of large and small farmers under the Act. The debates also show that the Section 13(a)(10) exemption was clearly related to and forms an integral part of the agriculture exemption. Addison v. Holly Hill Pruit Products, 322 U.S. 607, 612-613. Also. as stated by Mr. Justice Rutledge, dissenting in the Holly Hill case the operations exempted by Section 13(a)(10) consist of the first stages of preparation for market. 322 U.S. at 626. Surely the purpose of Section 13 (a) (10) cannot be served if nearby plants preparing the farmer's crops for market are excluded from the exemption just because they are located in small rural communities such as Quiney, with a population exceeding 2500.

This Court stated in the Holly Hill case (322 U.S. at 615):

"Congressional purpose as manifested by text and context is not rendered doubtful by legislative history. Meagre as that is, it confirms what Congress has formally said. The only extrinsic light cast on Congressional purpose regarding area of production is that cast by the sponsors of this provision for enlarging the range of agricultural exemption. Senator Schwellenbach frankly stated that the largest apple packing plant in the world would be exempt if the work done in that plant is as described in the amendment. St Cong. Rec. 7877. And in the House, Representative Biermann, while explaining his

amendment in somewhat Delphic terms, did indicate plainly enough that he had in mind not differences between establishments within the same territory but between rural communities and urban centers: may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town.' 83 Cong. Rec. 7401.

"Representative Bierman was asked whether his amendment 'would apply to a packing house located in Iowa and Illinois in the area of production, which employs two or three hundred men'. This was his complete answer: 'Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the State of Iowa that this amendment would apply to perhaps: but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town.' Certainly Mr. Biermann did not give the remotest intimation that 'area of production' was meant to convey any idea other than that which area usually conveys." [Emphasis supplied]

Obviously, an agricultural community, such as Quincy, Florida, is not an urban center in the above sense, regardless of how it may be classified for census, statistical or other purposes. As Congressman Biermann indicated, his reference to "large cities" meant places like Jersey City and New York City and not agricultural communities or little towns such as Quincy. See his statements appearing at 83 Cong. Rec. 7401, quoted infra, Appendix E, p. 117.

Since, as we have shown, the Administrator's definition of "area of production" is invalid as applied here in excluding Respondents' plants from such "area" simply because they are located in a town of over 2500 population, and since the Respondents' employees otherwise fall within the Section 13(a)(10) exemption, the Court of Appeals correctly ordered dismissed Petitioner's suits for injunction. As held by the court below (RK 95, RB 165), Peti-

tioner is not entitled to an injunction until he issues a valid definition of "area of production" excluding Respondents' plants. Addison v. Holly Hill Fruit Products, 322 U.S. 607, 619 is not to the contrary. There this Court, after invalidating the "area of production" definition, remanded the case to the District Court with instructions that it be held pending the adoption of a valid definition. But since that was a suit by employees for wage payments for the past, a dismissal of the suit might have been res adjudicata. On the other hand, Petitioner here is seeking injunctions against future violations of the Act and his right to such injunction depends upon the existence: of a valid definition which excludes Respondents' plants. Absent such definition the suits for injunction should be dismissed.46 Such dismissal will not be res adjudicata in any future injunction suits, if Respondents should not be exempt under any new valid regulation as to "area of production" and should fail to comply therewith.

Walling V. McCracken County Peach Growers Ass'n., 50 F. Supp. 900, 905-906 (W.D. Ky.); Messenger V. Traders Compress Co., 107 F. Supp. 354, 361 (E.D. Okla.) rev'd. on other grounds sub nom. Tobin V. Traders Compress Company, 199 F. (2d) 8-(C.C.A. 10). We do not understand Petitioner to contend to the contrary if the definition is invalid; his argument is that the "area of production" definition is valid.

III. IF THE COURT IS UNABLE ON THE PRESENT RECORD TO HOLD THE EXEMPTION OF SECTION 13(a)(6) APPLICABLE TO RESPONDENT KING EDWARD'S PACKING PLANT EMPLOYEES, OR TO HOLD THAT SUCH EMPLOYEES AND ALSO THE EMPLOYEES OF RESPONDENT BUDD PERFORM OPERATIONS ENUMERATED IN SECTION 13(a)(10), AND THAT THE AREA OF PRODUCTION DEFINITION IS INVALID, THE ACTIONS SHOULD BE REMANDED TO THE DISTRICT COURT FOR TRIAL OF THE ISSUES.

We have shown hereinabove that the facts in the Record clearly establish that the Court of Appeals correctly grant; ed summary judgment to the Respondents. But if, contrary to our contention, this Court regards the Record as inadequate for that purpose, it should simply remand the actions to the District Court and order a full trial of the issues.

As pointed out, supra p. 11, early in the litigation Respondent King Edward filed a motion for summary judgment (RK 6) which the District Court denied (RK 37). The reason given by the court for its action was that "the factual questions presented by the pleadings are such that this case may not appropriately or safely be disposed of on motion for summary judgment" (RK 36). Yet subsequently the court itself suggested that all parties file motions for summary judgment (RK 86, 57), even though the Record discloses nothing that had occurred in the meantime, which rendered the case any more "appropriate" or "safe" for disposition on motion for summary judgment."

⁴⁷ In its opinion, granting Petitioner's motion for summary judgment, the District Court, referring to the earlier denial of King Edward's motion, stated

[&]quot;Because of collateral factual issues raised by plaintiff in this case, which the plaintiff was unwilling to waive at that

In opposing King Edwards' earlier motion for summary judgment, Petitioner filed a Response urging that there are "serious and genuine disputes as to many material, facts which can only be resolved by a full and complete trial of the issues", and listing some of such questions. as being whether King Edward is a "farmer" within the meaning of Section 3(f); whether its packing plant-operations are incident to and in conjunction with its farming operations within the meaning of that section; whether its packing plant employees perform operations enumerated in Section 13(a)(10); and whether the Administrator's definition of "area of production" is arbitrary and capricious in containing a population limitation (RK 12, 11): In two briefs filed with the District Court in support of this Response, Petitioner argued strenuously that these questions could be resolved only after full presentation of all material facts bearing upon them. And his briefs were replete with citation of authorities as to the narrow limits within which motions for summary judgment are tobe granted.

If Petitioner's thesis is accepted, then the pleadings and affidavits in the Record, upon which his motion for summary judgment was granted, were insufficient to permit a decision on whether in fact the employees here involved are exempt under Section 13(a)(6) or Section 13(a)(10). In that situation it was as wrong for the District Court to deny the exemptions as to allow them. Yet by granting Petitioner's motion for summary judgment, the District Court did in fact deny the exemptions. The proper course was to withhold judgment until after full trial of the issues at which all pertinent facts could be adduced.

time, the Court was compelled to and did, deny defendant's motion for summary judgment" (RK 57).

Neither the District Court's opinion nor the Record discloses what such collateral factual issues were, or, whatever they were, that they did not exist as much when the Court granted Petitioner's motion for summary judgment as when it denied King Edward's earlier motion.

The sammary judgment procedure, authorized by Rule 56 of the Federal Rules of Civil Procedure, is to be exercised only where no genuine issue of fact exists. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627; Loew's Inc. v. Bays, 209 F. (2d). 610, 614-615 (C.C.A. 5); Williamson v. T.S.C. Motor Frt., 203 F. (2d) 257, 258 (C.C.A. 5); Arnstein v. Porter, 154 F. (2d) 464, 468 (C.C.A. 2); Rogers v. Girard Trust Co., 159.F. (2d) 239, 241 (C.C.A. 6); Avrick v. Rockmont Envelope Co., 155 F. (2d) 568, 571; (C. C.A. 10). This is as true in suits arising under the Fair Labor Standards Act as in any other type of suit, whether for injunction (Walling v. Fairmont Creamery Co., 139. F. (2d) 318, 322 (C.C.A. 8); Walling v. Reid, 139 F. (2d) 323, 326 (C.C.A. S)), or for back pay (Kennedy v. Silas Mason Co., 334 U.S. 249, 256-257; Bozant v. Bank of New York, 156 F. (2d) 787, 790 (C.C.A. 2)).

The authorities are also clear that where there is judgment for the plaintiff on the pleadings, the case should be treated as if the facts well pleaded in the answer were established. National Metropolitan Bank v. U.S., 323 U.S. 454, 456-457; Purity Cheese Co. v. Ryser, 153 F. (2d) 88, 89 (C.C.A. 7) and cases there cited. The pleadings, affidavits, etc. should be liberally construed in favor of the party against whom the summary judgment is sought: Mitchell v. Pilgrim Holiness Church Corp., 210 F. (2d) 879, 881 (C.C.A. 7), cert. den. 347 U.S. 1013; Dulansky v. Iowa-Illinois Gas and Electric Co., 191 F. (2d) 881, 884 (C.C.A. 8).

Petitioner has in effect conceded (RK 12) that the allegations in Respondent King Edwards' answer and affidavits (RK 3-11, 35, 48-53) raise sufficient question as to the application of the exemptions here involved to King Edward's packing blant employees so that King Edward is entitled at least to a full trial of the issues. The same is

King Edward is not foreclosed from making this argument because it too filed a motion of summary judgment at the same time-

true as to the allegations in Respondent Budd's answer (RB 32 et seq.) and the admissions of Petitioner (RB 48-52, 56-57) and of Respondent Budd (RB 141-142) in that case.

as Petitioner. King Edward filed such motion only at the insistence of the District Court (RK 57, 86). And in any event the fact that both parties have moved for summary judgment does not indicate that there is no issue of material fact. Garrett Biblical Institute V. American University, 163 F. (2d) 265, 266 (App. D.C.). By moving for summary judgment a party concedes only that no genuine issue of facts exists for the purpose of his motion, but this does not carry over and constitute such concession as to the other party's motion for summary judgment. Walling V. Richmond Screw Anchor Co., 154 F. (2d) 786, 784 (C.C.A. 2), cert. den. 328 U.S. 870 (This case was very much like the instant one in that it involved a suit for injunction brought by the Administrator under the Act, with both parties moving for summary judgment); Begnard V. White, 170 F. (2d) 323, 327 (C.C.A. 6); F.A.R. Liquidating Corp. V. Brownell, 209 F. (2d) 375, 380 (C.C.A. 3).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed. In the alternative, if the Court finds it inappropriate to affirm the summary judgments directed by the Court of Appeals, the actions should be remanded to the District Court with instructions to proceed to trial of the issues.

Respectfully submitted,

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APPENDIX A

Statutes and Regulations

1. Statutory Provisions Involved.

Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U.S.C. §201):

Section 13(a)(6) exempts from both the wage and hour provisions of the Act "any employee employed in agriculture". Section 3(f) defines "agriculture" to include—

"... farming in all its branches and among other things includes the cultivation and tillage of the soil, dairving, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities" (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

Section 7(c) provides as follows:

"In the case of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cotton-seed, or in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural com-

modity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

Section 13(a)(10) exempts from both the wage and hour provisions of the Act

"any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese of butter or other dairy products";

2. Administrator's Regulations, Part 536, Defining "Area of Production."

In Regulations, Part 536, 29 Code of Fed. Regs., Ch. V, Section 536.2, WHM 35:52-53, the Administrator has defined "area of production" as used in Section 13(a)(10). Such definition follows:

"SECTION 536.2—"AREA OF PRODUCTION" AS USED IN SECTION 13(a)(10) OF THE FAIR LABOR STANDARDS ACT

- (a) An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a)(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:
- (1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

- (i) with respect to the ginning of cotton-10 miles;
- (ii) with respect to operations on fresh fruits and vegetables—15 miles;
- (iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection 4-20 miles;
- (iv) with respect to the compressing and compresswarehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.
 - (b) for the purposes of this regulation;
- (1) "Open country or rural community" shall not include any city, town or urban place of 2,500 or greater population or any area within
 - (i) one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

(iii) five air line miles of any city, with a population of 500,000 or greater

according to the latest available United States Census.

- (2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.
- (3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar.

month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable." [Emphasis supplied.]

APPENDIX B

Legislative History of Sections 13(a)(6) and 3(f)

1. Debate on Senator McGill's amendment to provide that the agriculture exemption should apply (1) to practices performed on a farm as an incident to farming. operations and (2) to "delivery to market."

"Mr. McGill. Mr. President, the purpose of the amendment is to broader the definition of 'employee' as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing [sic] machine outfit and employs a crew and is employed by a farmer to thrash [sic] his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included. It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

"Mr. George. Is it the purpose of the amendment to exempt those who thresh grain?

"Mr. McGill. Those who thresh grain, who harvest grain and deliver it to market.

"Mr. George. Would the amendment also apply to the harvesting of any other crop?

"Mr. McGill: It would apply to any commodity pro-

duced on a farm.

"Mr. George. Would it apply to peanut pickers who pick in the fields?

"Mr. McGill. Yes.

"Mr. George. And who move peanuts to the market?

"Mr. McGill. Yes that it my understanding."

"Mr. George. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

"Mr. Black. That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment, but some Senators who were doubtful about it wished to draw a clarifying amendment.

"Mr. George. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

"Mr. Black. Unquestionably.

"Mr. McGill. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is vincidental to agricultural purposes.

"Mr. George. And so long as it is merely preparatory and necessarily preparatory to the marketing of

the field crop. Is that true?

"Mr. McGill. That is true; and the language would also include all labor performed in making delivery to market."

"Mr. George. I thank the Senator.

"Mr. Copeland.. Of course, that would take care

of my apple man, about whom I have been worrying, would it not? It would take care of the farmer who gets has crop of apple s to the market, wouldn't not? Mr. McGill. That is correct. [Emphasis supplied]. SI Cong. Rec. 7888

2 Debate an immediment proposed by Senator McAdoo.

Schator McAdoo proposed an amendment, substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

"Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvestings packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits." 81 Cong. Rec. 7927.

The following discussion ensued:

"Mr. McGill. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word farmer, the words or on a farm, and also by inserting in line 14, after the word operations, the words fineluding delivery to market, it being the purpose of these amendments to exclude from the bill all labor performed on a farm, whether by contract with the farmer or otherwise, and to exclude all labor connected with the delivery to market of commodities produced on a farm.

I will state that I feel the amendment adopted vesterday is breader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted vesterday, such as mentioning harvesting, packing, and operations of that character. The amendment adopted vesterday was intended to include, and, I think, it does include, all kinds of labor to parformed on a tarm and all kinds of labor in con-

het. In my judyment it includes more than does the amongiment proposed by the Sonator from taling and and is broader in its terms. It here, that the amendment adopted exesterday will remain in the left and that the amendment of the Sonator from California, by virtue of the marrower terms carried is it, will

be rejected, at

Mc George, I suggest to the Senator from California that, in my opinion the amendment offered by the Senator from Kansas [Mr. McGill] vesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

"I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas' I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind" [Emi-

phasis supplied]. Id., pp. 7927, 7928-7929.

3. Debate on Conference Report between Senator Thomas and Senator Johnson.

"Mrg Johnson of California: I take it from what the Senator has said that the agricultural exemptions are practically plenary, and take in almost all agricultural products.

"Mr. Thomas of Vtah. I could not hear part of the

Senator's sentence.

"Mr. Johnson of California. I said that, in acnoral language, agriculture is exempted from the operation of the bill.

"Mr. Thomas of Utah. It is.

Mr. Johnson of California Does the Senatorio know of and provided a kind of goviculture that is included in the hill?

"Mr. Thomas of Utah. I do not know of any. The definition seems to be all inclusive, and no tried to make it so TEmphasis; supplied). 83 Cong. Rec.

APPENDIX C.

Administrator's Interpretations of Sections 13(a)(6) and 3(f)

1. Interpretative Bulletin No. 14 (WHM 35:351-366).

"Practices . . . Performed by a Farmer"

10. It should be noted with respect to all of these paractices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. It makes no difference whether they are performed on or off the farm if performed by a farmer. [Emphasis supplied]

"When a farmer is engaged in these practices on agricultural or horticultural commodities grown on other farms as well as his own, as for example, when he cans tomatoes which come both from his farm and from the farms of others, such operations do not seem to be incident to or in conjunction with his farming operations. In our opinion such operations assume the aspect of an independent business and do not fall within this exemption."

Preparation for Market (Performed by a Farmer)"

(b) The term 'preparation for market'-must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

- L. Gruin, and and parage crops. Weighing banning, stacking, cleaning, grading, shelling, sief ing, packing, and storing
- 2. First, and conclude. Assembling, binning ripening, cleaning, grading, sorting, drying, preserving, pre-linear storing, and canning.
- 33. Nats (parans, uniteds, parants etc.)—Grading, cracking, shelling, cleaning, sorting, packing and storing, unshelled nuts and performing the same operations except pracking and shelling, upon the nut meats.
- 4. Sugar. Manufacturing raw sugar, cane, or maple syrup and molasses.
- 5. Eags. -Handling, cooling, grading, and packing.
 - 6. Wood.-Grading and packing.
- 7. Dairy products.—Salting, printing, wrapping, packing, and storing butter; ripening, niolding, wrapping, packing, and storing cheese; and canning or packing any other dairy product.
- 8. Cotton:—Weighing, ginning, and storing cotton; hulling, delinting, deaning, sacking, and storing cottonseed.
- 9. Nursery stock.—Handling, wrapping, packaging, and grading.
- 10. Tobacco. Handling, drying, bulking, striping, tying, sorting, stemming, packing, and storing.
 - 11. Livestock.—Handling and loading.
- 12. Poultry.—Culling, grading, cooping, and loading.
- 13. Honey. Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.
- 14. Far.—Removing the pelt, scraping, drying, putting on boards, and packing. [Emphasis supplied]

Delivery to Storage (Performed by a Farmer)

the commodities, dairy products, livestock, bees or their honey, fur bearing animals or their pelts, or positive to the playes where they are to be stored or held pending preparation for or delivery to market."

"Delivery ... to Market (Performed by a Farmer)"

(d) The term delivery to market includes taking the commodities, dairy products, livestock, bees or their honey, fur bearing animals or their pelts, or poultry to market.

Market (Performed by a Farmer)"

to carriers for transportation to market includes taking the commodities, dairy products, livestock, bees or their honey, furbearing animals or their pelts, and poultry to a carrier—truck, railroad, ship, etc.—for transportation by such carrier to market."

"Other Practices (Performed by a Farmer)"

"(f) Besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption.

"The actual selling of the agricultural or horticultural commodities, etc., is such a practice. The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt. If a company has sugarcane fields and also a mill, the transportation of its own sugarcane to the mill seems an incidental practice which is included in this term.

"It must be emphasized with respect to all practices performed by a farmer, for which a claim is made that they are incident to or in conjunction with his farming operations, that they must be performed only on the agricultural or horticultural commodities, dairy products, livestock, bees, fur-bearing animals, or poultry produced or raised by him. The same

limitation applies with respect to the practices dis-

"Practices... aPerformed ... on a Fagar"

- "(1. The term practices (including any forestry or lumbering operations) performed ... on a farm as an incident to or in conjunction with farming operations, involves substantially the same inquiries as those discussed in paragraph 10.
- "Is should be observed, however, that since these practices must be performed on a farm, one of the activities listed in the statute, namely, delivery to market, cannot normally be one of the included practices, for that involves working off the farm. Hence, employees of independent contractors engaged in transporting to market agricultural or horticultural commodities, dairy products, poultry, livestock, bees or their honey, and fur-bearing animals or their pelts. would not be exempt. With that exception, practices described in paragraph 10, even if performed by em. ployees of someone other than the farmer, are ex-Juded from the wage and hour coverage of the act, so long as they are performed on the farm and as an incident to or in conjunction with such farming oper-·ations.

"Thus, if an independent contractor threshes wheat on a farm, his employees are not subject to the wage and hour provisions of the act while they are so engaged on the farm where the wheat is grown. So, too, employees of an independent contractor who inspect and cull flocks of poultry on a farm are exempt while they are working on the farm where such poultry is raised. Similarly, employees erecting a silo on a farm are exempt while they are working on such farm." [Emphasis supplied]

"Office Workers, Etc."

"12. We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in section 3(f). In our opinion such employees are exempt."

2. Other Administrative Interpretations

The Department of Labor in various opinion letters and, releases has held the following to come within the agriculture exemption:

- (a) Handling of tobacco in a warehouse by a farmer who grows the tobacco, including drying, redrying and further processing the tobacco. Quotations from the opinion of the Solicitor of Labor follow:
 - "ANSWER (SOLICITOR OF LABOR): You ask whether the handling of the broad leaf and shade grown tobaccos, including all of the operations in the warehouse, comes within the Section 13(a)(6) exemption. This exemption may under proper circumstances apply to the operations performed on the tobacco by the growers provided that these operations. are 'performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.' It appears that the companies are engaged in the growing of tobacco. The operations to which you refer may under proper circumstances be incidental to or in conjunction with the farming operations performed by them or on their farms. You are correct in your assumption that in any weeks in which one of the companies is engaged in operations on tobacco other than that grown on its own farms, the Section 13(a)(6) exemption will be defeated. . . . The Section 13(a)(6) exemption is not limited to the first drying of a commodity but may also apply to redry. ing. Nor is this exemption limited to 'first processing' operations. Under proper circumstances it may apply to further processing of agricultural commodities if the tests set forth in paragraphs 10 and 11 of Interpretative Bulletin No. 14 are met." WHM 35:752-
- (b) "Where tobacco stemming is done by farmer or on farm, employees engaged in such work would appear to be exempt" under Section 13(a)(6). \$\mathbb{Z}\$ CCH Labor. Law Reporter, \$\frac{1}{2}5.242.344.
 - (c) Employees of an alfalfa grower, who haul the al-

falfa grown by the grower to a processing plant located off the farm. WHM 35:754

- (d) The removal of stumps by employees of an independent contractor from cut over timber land owned by a lumber company and now devoted by the lumber company to the growing of tung trees, where such removal and the plowing and fertilizing of the ground around the tung trees were necessary to the proper growth of the trees. WHM 35:751-752:
- (e) Work on the farm by field men of a cannery to which the farmer had contracted to sell his crops, not withstanding such field men from time to time report to the casning plant. 3 C. C. H. Labor Law Reporter 25,242.203.
- (f) Pre-cooling operations on the farm with respect to fruits and vegetables grown on the farm. 3 C. C. H. Labor Law Reporter, 5 25,242.21.
- (g) Logging operations performed by the farmer or on his farm with respect to timber blown down in a hurricane. 3 C. C. H. Labor Law Reporter 5 25,242.252.
- (h) Vining of peas grown on a farm by g vinery located thereon, 3 C. C. H. Labor Law Reporter 5 25,242,281.
- (i) Packing by one who leases a farm of the crops he grows on that farm. WHM 35:751. The full text of this opinion follows:

"Question: Does the exemption provided in Section 13(a)(6) of the Act for employees engaged in agriculture apply in either of the following circumstances:

(1) A packing house operator leases a farm and packs the fruit grown on that farm. . . .

"Answer (Administrator): (1) If in fact the case you present is one where an individual leases land and then proceeds to operate the land as his farm, planting, growing and harvesting crops, we believe

that in packing such crops and only such crops the exemption provided by Section 13(a)(6) of the act for employees employed in agriculture would apply to him. We base this opinion upon the assumption that there is an actual bona fide lease of the farm by the individual in question.

APPENDIX D

Administrator's Interpretations of Certain Terms Used in Section 13(a)(10)

1. Interpretative Bulletin No. 14.

In Interpretative Bulletin No. 14, WHM 35:351, 363, 364, issued August 1939 and Still outstanding, the Administrator interpreted the terms "handling", "packing", "storing", and "drying" as used in Sec. 13(a)(10). Such interpretations are as follows, in relevant part:

"Handling"

"26. The operation's included in this term appear to be those physical operations customarily performed in obtaining agricultural or horticultural commodities from producers' farms; transporting them to and receiving them at the establishment, weighing them or otherwise determining on what basis the producer is to be paid, placing them in the establishment where further operations are to be performed, and delivering the commodities to warehouses. cifically, these operations in hide loading the com-· modities on trucks, wagons, etc., in producers' fields. or at concentration points, transporting them to the establishment, receiving and unloading them at the establishment, counting or weighing the comingdities, assembling, binning, piling, or stacking there in the establishment; moving them from one place to another in the establishment, moving the bags, boxe; cases, barrels, bales, coops, and other loaded containers to wagons, trucks, railroad cars or other conveyances, and transporting the commodities away from the es.

tablishment. Since it makes no difference that the employer does not own the goods being handled, the employees of brokers or commission houses who physically handle the goods may be within the exemption.

"Packing"

"27. Included in this term are those aperations involved in placing agricultural or horticultural commodities in containers, and also the operations necessary to close or fasten such containers. Examples of specific activities, which are included in this term, are the sacking or bagging of unshelled pecans or other unshelled nuts, the sacking of grain, and the placing of fresh fruits and vegetables in crates.

"Storing"

"28. Operations which appear to be included in this term are those involved in (1) placing agricultural or horticultural commodities in storage rooms or other places where the commodities are to be held prior to further preparation, sale or shipment; (2) taking care of the commodities while they are being so held; and (3) removing them from the storage rooms and transferring them to wagons, trucks, railroad cars, or other conveyances."

"Drying"

"32. The operations included in this term appear to be those performed on agricultural or horticultural commodities in order to remove or lower their moisture content. Such operations may be performed by natural methods or by exposure to heat from ovens, furnaces, etc. Typically, these operations are performed on fruits, vegetables, hay, and tobacco. The term does not include drying operations which take place on commodities that have ceased to be agricultural commodities within the meaning of Section 13 (a) (10) because their natural form has previously been changed. Thus, the drying of eggs that have been broken and separated and the drying of tobacco that has been stemmed are not included within the exemption."

2. Administrator - Release M-12.

In his release M.12, issued in February, 1947, WHM 35:63-64, the Administrator described the operations upon tobacco which are enumerated in Section 13(a)(10). The description follows:

"If your employees are engaged within the area of production in the handling, packing, drying, or stripping of tobacco for market they are exempt from both the minimum wage and overtime provisions. The "for market" requirement applies to each of the specified operations. Thus, employees of a cigar manufacturer who are handling tobacco for use by their employer in the manufacture of cigars are not exempt because they are not handling tobacco "for market."

To aid employers in judging whether their employees' activities are within these specific operations, the

following interpretations are offered:

"Handling" includes those physical operations customarily performed in obtaining tobacco, transporting it to and recliving it at the establishment, weighing it, placing the tobacco in the establishment, and delivering it to warehouses or to transportation facilities.

"Packing" includes operations involved in placing tobacco in containers, and closing or fastening the containers.

"Drying" may be performed by natural methods or by exposure to heat from ovens, furnaces, etc.

"Stripping" includes the pulling of tobacco leaves from the stalk, tying the tobacco leaves into hands, grading and sorting."

APPENDIX E

Legislative History of Section 13(a) (10)

1. Debates on Senator Schwellenbach's "area of production" amendment which was adopted in the Senate.

Senator Schwellenbach's amendment read

"The term 'person employed in agriculture," as used in this Act, insofar as it shall refer to fresh fruits or vegetables, shall include persons employed within the area of production engaged in preparing, a packing, or storing such fresh fruits or vegetables in their raw or natural state." SI Cong. Rec. 7876.

The pertinent portions of the debate on such amendment follow:

"Mr. Schwellenbach. . . . The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes. If we leave the bill the way it now stands, it is going to mean that the large producer on the large ranch who can afford to maintain the equipment on his own ranch is going to have an unfair advantage over the small man who has only 5 or 10 acres, and who has to send his crop to a central warehouse, or who may join with others in a cooperative warehouse, and there have the same processes performed." 81 Cong. Rec. 7659.

"But it seems that, so long as they remain in their natural state and all of the work that is done upon them is the ordinary agricultural operation up to the point of processing, whether they are handled on the farm or by a group of men gathered together in a cooperative, or turned over to a central warehouse, they should be exempt, because of the fact that if we do not exempt them, we are giving the large producer a very distinct advantage over the small producer, and I am certain it is not the purpose of the bill and is not within the economic theory of the bill to give

the large products an advantors over the small producer." [Emphasis sypplied]. 81 Uong. Rec. 7660.

Yr. Schwellenbach, The amendment is very richte frawn in an effort to limit the operations detherein purely to those of an agricultural nature ... In other words, in a small apple operation of or 10 or 15 or 20 acres, it is not possible for the owner of the ranch to purchase and maintain on the ranch the necessary machinery which is required in the washing operation under the rules and regula-tions of the Department of Agriculture. It is not possible for him to provide on his ranch the necessary storage space to store the apples until such time as it is possible to take them to market. It is not possible on the small ranch to supply the space for packing the apples. Therefore, it is necessary for such a farmer either to join other farmers in a cooperative, or to send his apples to a packing house, and have these operations, which are purely agricultural operations, performed elsewhere than at the situs of the ranch or the farm.

"The purpose of this amendment is to give protection against that situation, and to make it possible for the small fruit and vegetable producer to operate upon the same basis as the large fruit and vegetable producer." (Emphasis supplied). 81 Cong. Rec. 7876.

"In other words, the small producer cannot afford to have the capital investment in the warehouse, the washing machinery, all of the necessary incidentals to this operation, while the larger producer can afford them, and he is exempt from the provisions of the bill." SI Cong. Rec. 7877.

The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill. The purpose of the amendment is to permit the small farmer, who cannot afford to

have his own carehouse and enough afford to love his own washing machine, to be placed upon a parity with the larger producers, who can afford to mainstain their own warehouses and their own washing machines and their own equipment. [Emphasis supplied]. 81 Cong. Rec. 7877.

"Mr. Connally. Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses, and packing plants in apple territory? There is no limit. The condition is that they are packing plants and if they are, they are exempt.

"Mr. Schwellenbach. If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt.

"Mr. Connally. My understanding is that the largest apple-packing plant in the world is located at Winehester, Va., right in the heart of a great apple-producing region. That would be exempt, would it not?

Mr. Schwellenbach. If the work done in that, plant is as described in the amendment, it would be exempt." [Emphasis supplied.] 81 Cong. Rec. 7877.

2. Debates in House on Lea-Lucas amendment, broadening Sepator Schwellenbach's amendment to cover all "agricultural commodities" and not, only "fresh fruits and vegetables".

The Lea-Lucas amendment read as follows:

"'Person employed in agriculture' shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural commodities in the raw or natural state." 82 Cong. Rec. 1784.

The following debates took place:

"Mr. Lea. Mr. Chairman, Subsection (20) grants

an exemption to labor engaged in preparing, packing or storing fresh fruits and vegetables within the areas of production. This amendment is necessary to give to the fruit industry, and agriculture generally, that exemption that has been promised and which is clearly within the purpose of the bill. The defect in Subsection (20), as it stands, is that it is confired to fresh fruits and vegetables and omit all other farm products equally entitled to the exemption. Part of the farmer's labor should not be in the bill and the same laborers exempted when performing other agricultural labor.

."Mr. Keller. Fresh or not fresh?

"Mr. Lea. Fresh or not fresh.

"Mr. Keller. That is what I am asking the gentleman.

"Mr. Lea. The section is confined to fresh fruits and vegetables and omits to give similar exemptions to all other products. Mr. Chairman, I am agreeable to the substitute of the gentleman from Illinois (Mr. Lucas), which would include agricultural commodities and relieve the section of the unfair discrimination it now contains.

"Mr. Keller. What does that mean?

"Mr. Lea. Ordinary agricultural commodities of

"Mr. Keller. What does the gentleman mean by that?

"Mr. Lea. The exemptions of this section are confined to preparing, storing, and packing in the area of production.

"Mr. Lucas. . . . This amendment merely provides that a 'person employed in agriculture' shall include persons employed within the area of production engaged in preparing, packing, or storing agricultural commodities in the raw or natural state.

"It broadens the definition and will adequately proteet the farmers of my section. It exempts agriculture in all its branches and work incidental thereto, including the necessary handling and preparing for market commodities when performed by the farmer or by a farmer's owned and controlled cooperative it should be understood that it applies only to the employees in the area to be determined by the Administrator where the commodity is produced. (Emphasis supplied). 82 Cong. Rec. 1783, 1784

3. Debates on Birrmann amendment, the manufactors foregunier, of Section 12(a)(10).

Mr. Biermann's amendment read as follows:

"Employees engaged in agriculture includes individuals employed within the area of productions engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, or canning of farm products and in making cheese and butter." 83 Cong. Rec. 7401.

Pertinent portions of the debates on such amendment follow:

"Mr. Bjermann, . . . As Charles W. Holman, Sec. retary of the National Cooperative Milk Producers Federation, says: 'Persons employed in 'agricultural processing plants in country districts are well paid and are envied persons in their community. Farm labor, and, indeed, many farmers themselves would be happy to change places with those persons fortunate enough to be employed in creameries, el ese factories, and country milk plants'. . . . Nearly every large farm organization in the United States has endorsed this amendment. I know of none that one poses it: It is a well-known fact that most of the cost-in most cases all of it-of running these farm factories is taken out of the amount the farmer receives for his product. . . Now why do we want farm factories exempted from the ferms of this bill? Because they have to be conducted in nost cases in a way very different than the way the be factories run. . . . The employees in these farm factories ares. not complaining. They know the nature of their business requires elastic hours-and they know that the

rigid rules laid down in this bill would not work in the farm factories. We should not disrupt these little businesses, which are handling farm products direct-A from the farm and which are supplying good jobs to Nisfied employees. . . . The amendment I have proposed would strengthen this bill without sanctioning substandard labor. It would save the farmers of America from an expense they should not be subject to. No good purpose would be served by including farm factories in this bill. Wage and hour legislation on a national scale is an experiment in America. Is it not wise to move cautiously! The bill is framed with big factory conditions in mind. Why include little farm factories, where labor conditions are good? The organized farmers of America ask that this amundment be adopted. Its adoption would not weaken the bill. The bill is aimed at substandard labor conditions. We ask you to exempt industries in which substandard labor conditions do not exist." 83 Cong. Rec. 7325, 7326. . . .

. . . In an amendment I inserted in the Record yesterday I included the word 'processing'. I call attention to the fact that in the pending amendment this word is stricken out. I struck it out for the reason that some Members thought that processing would include the making of cotton and wool into textiles, and rubber into finished products, and a long list of things of that kind. The amendment I have offered includes only the first processing of things that come off the farm. The important point is that the farmer pays the bill for this processing. Those of us who come from dairy sections know that the cost of making butter fat into butter or milk into cheese is borne by the farmer. There is no content tion about that, no argument. The members from the South will agree that the man who raises the cotton pays for ginning the cotton. When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increases the farmer gets just so much less, and our contention and the contention of the farm organizations is that the bill designed to help labor should not be so worded that it puts another burden on the agriculture of this country." (Emphasis supplied). 83 Cong. Rec. 7401.

"Mr. Thompson of Illinois. May I ask the gentleman from Iowa whether his amendment would apply to a packing house located in Iowa and Illinois in the area of production, which employs 200 or 300 men?

"Mr. Biermann. Speaking frankly, I think that is something that would have to be worked out. There are some packing houses in the state of Iowa that this amendment would apply to perhaps; but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town." 83 Cong. Rec. 7401.

"Mr. Riermann. The question to be decided in voting on this amendment is whether or not the farms of the United States are going to have their definition of 'employee' as applied to agriculture or whether it is going to be written by people who have a city viewpoin. I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding the big factories in Jersey City, New York City, and some of the other large cities, by the same token, we who come from the farm areas are best qualified to say what terms should apply to labor in those areas. I may say that not a single employee in any of these factories has made an objection to this, so far as I know.

"Mr. Whittington. It is simply to permit the farmer to get his material prepared for market.... [Emphasis Supplied] 83 Cong. Rec. 7401.

"Mr. Biermann. I want to read a couple of sentences from a letter I received this morning from Edward A. O'Neal, president of the Farm Bureau Federation, in which he sets out the desirability of writing into this bill definitions such as proposed in my amendment. He states: 'We believe the bill should be clarified so as to assure the exemption of employees in such agriculture and horticulture industries in rural areas.' That is all my amendment takes, in. He states further, as follows: 'Failure to exempt these operations when performed in rural areas.

where conditions are so greatly different from the situation in large industrial and urban centers, will-result in increased costs of processing and handling these products which will be reflected back in lower prices paid to farmers. 83 Cong. Rec. 7402. . . .

"Mr. Reilly. Does the gentleman's amendment cover a pea-canning set-up that is situated away from the farm on which the peas are grown?

"Mr. Biermann. In a little town?

"Mr. Reilly. In a little town; yes.

"Mr. Biermann. But in the farm area?.

"Mr. Reilly, Yes.

"Mr. Biermann. Yes; it does. 83 Cong. Rec. 7402

"Mr. Wadsworth, . . . Let us look for a moment at the business of canning in a country canning factory.

from the provisions of this bill, then all of its wageand-hour limitations will be placed upon it, as well as the overtime provision, and when you increase the cost of processing fresh vegetables, you must expect one of two results. First, the factory must raise its price to the consumer—and I happen to know that they run on an exceedingly narrow margin—or else reduce the price paid to the farmer, and that is always what is done. Whenever you increase arbitrarily the cost of processing these fresh vegetables the farmer gets less per ton for them. I have been through it myself. 83 Cong. Rec. 7403.

"Mr. Gilchrist. . . . The amendment provides that out in the open country, where the handling, packing, or storing of agricultural commodities is done, there shall be certain exemptions from the provisions of the bill. We should have such exemptions so as to apply them to our creameries and milk producers and cheese makers. Do not destroy these farm activities. There is no question of health involved in what is done out in the open country, because the conditions there are healthful. The tempo of work

out there is slower than in the cities (83 Cong. Rec. 7405). . . There is no question involved as to the necessity for this amendment in the cities, and I would like to be for the bill if I can be. I deny the insimilation the gentleman from the city of Brooklyn made that we are trying to sabotage this bill. That gentleman has no interest in farms or farming. As was said by another, There has not been a calf born in his district for 50 years.' It is not the purpase to sabotage the bill, but if we do support the bill, it will be because it does not destroy our industries. The old bill provided for the things contained in this amendment. Why the change? The present bill takes care of the packing of apples, peaches, and pears, but it does not provide for such things as the canning of corn, the canning of tomatoes, or any of the other industries that the little villages depend upon and must depend upon. You folks are going to deny them that right if you vote lown this amendment." 83 Cong. Rec. 7405-7406.

No. 278

Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR.
UNITED STATES DEPARTMENT OF LABOR.

Petitioner.

KING EDWARD TOBACCO COMPANY OF FLORIDA and MAY TOBACCO COMPANY.

. Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT MAY TOBAÇCO COMPANY.

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INDEX.

	PAGE
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	
	- 2
ARGUMENT:	
Point I.—May's employees employed in its pack-	
ing plant are engaged in agriculture as defined	
in Section 3(f) of the Fair Labor Standards	
Act and are exempt under Section 13(a)(6)	
from the wage and hour provisions; of the	:
	7
The Plain Language of the Act.	7
The Decisions of This Court	9
Petitioner's Misinterpretation of Legislative History	· · · · · · · · · · · · · · · · · · ·
Prior Departmental Construction of Section	
3(f)	14
Conclusion	15

TABLE OF CASES.	
Currin v. Wallace, 306 U. S. 1, 7	PAGE 12
Farmers Reservoir & Irrigation Co. v. McComb. 337 U. S. 755	
Maneja v. Waialua, 349 U. S. 254	7
Unifed States v. American Trucking Associations, 310 U. S. 534, 549	15
STATUTES.	
Fair Labor Standards Act:	

1, 6, 7, 9, 10; 11, 12, 13, 14, 15

1, 2, 7, 11

6, 14

Section 3(f)

Section 13(a) (10)

Section 13(a)(6)

Supreme Court of the United States

OCTOBER TERM, 1955

James P. Mitchell, Secretary of Labor, United States
Department of Labor,

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BRIEF OF RESPONDENT MAY TOBACCO COMPANY.

The reference to the opinions below, the grounds of jurisdiction and the statute involved are sufficiently stated in petitioner's brief and the appendix thereto except that the District Court rendered a supplemental opinion (RK 74, 24 Labor Cases, \$68,056). Abbreviations to record references are the same as in petitioner's brief.

Questions Presented.

1. The principal question presented in the May case is whether its employees, employed in its packing plant who prepare for market its own tobacco leaf grown on its own farms, are engaged in agriculture as defined in SecSon 3(f) of the Fair Labor Standards Act and are, therefore, exempt under Section 13(a) (6) from the wage and hour provisions

2. Questions 2 and 3 stated in the brief of respondents Budd and King Edward are also presented here. We adopt the argument of those points in that brief and shall not repeat them.

Statement of the Case.

As to May, the petitioner's statement of the case is inadequate and incomplete and necessitates the following restatement.

May was an intervenor in the King Edward case (RK 37-39, 44). It was not a party to the Budd case even though the District Court decided the motions for summary judgment in both actions in a single opinion (RB 145; RK 55).

May is engaged in the business of raising and curing, in Gadsden County, Florida, U. S. type No. 62 tobacco for use as eigar wrapper (RK 67). This type of tobacco is grown only in Gadsden, Leon and Madison Counties, Florida, and in two counties in Georgia (RK 67).

May owns al! of the farms which it operates, consisting of about 2,800 acres of woodland, grazing land and general farm land, between 80 and 100 acres of which is devoted to the planting, raising and harvesting of type No. 62 tobacco (RK 67-8, 84A). The initial stages of curing the tobacco also occurs in the curing barns on the farms (RK 69).

May also owns and operates a tobacco packing plant located in Quiney, Florida, about ten miles from its farms. At this plant the later stages of the curing of the tobacco and its preparation and packing for market are completed (RK 67-8).

No other tobacco except that produced on May's own farms is received at its packing plant and it is only its own tobacco that is bulked and packed at that plant. May has never received into or handled at its packing plant any tobacco produced by others (RK 67, 71).

This tobacio i grown under muslin cloth or cheesecloth to provide shade (RK, 67). In horvesting this type of tobacco, as each leaf reaches a certain stage of maturity on the stalk, it is picked or "primed", the lower leaves being first picked, and this "priming" is repeated from four to seven times up the stalk as the tobacco leaves mature. At each priming the leaves are immediately taken into the curing barn located on the farm, strung and hung on sticks to dry, permitted to absorb moisture and then re-dried (RK 58, 69, 91-2). As each priming loses its green color and becomes a shade of brown, it is taken down, packed loosely and transferred to the packing plant where it is placed in bulks on the floor of the packing plant. The transter from the curing barns to the packing plant must be prompt so as to avoid any harmful stoppage or acceleration of the intracellular changes taking place within the leaf (RK 69).

The handling of the tobacco in the packing plant consists of receiving it from the curing barns on the farm and piling the leaves into piles or bulks that centain between 3,500. and 4,500 pounds of tobacco. The bulking of the tobacco. in the packing plant in this manny occurs during a period of approximately two to four months (RK 68). that period the bulks are taken down from time to time and repiled or rebulked so as to take out the 'thands' of tobacco from the middle of the bulk and place them on the outside, and at the same time to put those that were on the outside of the bulk on the inside. This agrates the leaf and prevents an excessive heating or fermentation in the middle of the bulk and assures that the natural changes in the leaf will be as uniform as possible in all the leaves throughout the gutire bulk (RK s68). During the later stages of the bulking and upon its completion, the hands of tobac o are acrate I and sprayed with water. This spraying is known as "kasing." This kasing is no part of the curing

procedure. It is not done to stimulate or affect the fermentation of the leaf, but is solely for the purpose of keeping the leaf sufficiently moist, soft and pliable to withstand handling without breakage or injury (RK 68, 71).

When the bulk-sweating is completed and the temperature of the bulk ceases to rise, the bulk is taken apart, the tobacco leaves are sorted and graded by hand and rebulked to dry out over a further period of from two to four months, after which they are baled in bundles or packages, still unstemmed, for sale and shipment to the eigar manufacturer (RK 68).

The same employees who plant, cultivate and barvest the tobacco and hang it in the curing barns on the farm also work upon it in the packing plant. In fact, 90% of these employees live either on May's own farms or on adjoining farm lands. While they are working at the packing plant, May takes them back and forth by automobile trucks from their homes on the farms to the packing plant (RK 68).

The treatment and care of the tobacco leaf from the time it is first hung in the tobacco barn after priming until the bulking is completed in the packing plant is nothing but one entire and continuous process of natural transformation within the leaf itself, necessary to make the leaf in its raw or natural state fit for use as cigar wrapper the only use for which it is produced (RK 69). Thus, the changes in the leaf occurring at the packing plant would have continued if the Teaf remained in the curing barn and the barn had proper temperature and atmospheric control. It is impossible to say when the intracellular changes or breakdown duying the barn curing cease and the intracellular changes on breakdown during the bulking begin. In other words, the intracellular transformation which predominates during the barn curing on the farm continues after the leaf is moved into the packing plant and the bulk-sweating is

begun; similarly, those entracellular transformations predominating during the balk-sweiting actually considence, while the leaf still is in the curing barn (RK 70). The expert reflect upon so heavily by petitioner agrees that this is so (RK 23). Indeed, the only real reasons for the transfer from the barn to the plant are that the barns are not large enough to accommodate the quantity of leaf used in bulking and the curing would be too slow and lack unitrimity if the leaf remained in the barns throughout the entire period of curing (RK 69-70).

This continuous, natural, internal transformation is accomplished without the addition, application or use of any external catalyst or other chemical or artificial stimulation or process (RK 69). Moreover, during the entire bulking operation the leaf is neither stemmed nor cut and is subjected to no other treatment (RK 68-9). The only significant activities of May's employees in the packing plant are (1) the handling of the leaf in the bulking and rebulking to assist the natural curing process occurring within the leaf itself (RK 64, 68-9) and (2) the sorting and baling of the leaf (RK 35).

In short, what commences as a leaf of tobacco in the curing barn ends as a leaf of tobacco in the packing plant.

Petitioner asserts that the bulking in the packing plant requires a large amount of valuable and expensive equipment (Pet. Br. 7). There is absolutely no basis for this claim in the May record. Actually, the bulking in the May packing plant does not require extensive or expensive equipment.

The District Court acknowledged that it had no basis for asserting that May's packing plant is emprised with machinery (EK 75). Moreover, even in the Build case the description of the equipment plandy indicates that it is not complicated artisclaborate but only such as is necessary to regular temperature and humidity (RB 35).

The important fact is that all of the steps in the curing of the tobacco in the barns and in the packing plant are essential for the marketing of the tobacco, as the opinion of the Court of Appeals emphasized (RK 93). Petitioner, aware of the significance of that fact and finding suggests doubt as to its validity (Pet. Br. 534); Actually, the record sustains the finding. Indeed, nothing could be more specific than the uncontradicted allegation in the affidavit of Robert F. Gardner that this tobacco, "is and was . . . consistently and regularly marketed and ready for market . only when bulked, sorted and baled without stemming" (RK 35). But apart from this specific statement, the entire record is to the effect that the whole curing operation, from barn through packing plant, is for the very purpose of preparing the tobacco for sale and shipment to eigar manufacturers. There is not the slightest suggestion in the record that any sale of May's tobacco occurs until the curing is completed. To the contrary, there is the express statement that when the packing plant, activities are limished the tobacco is baled "for sale and shipment to the eigar manufacturer" (RK 68).

ARGUMENT.

If May's employees at the packing plant are engaged in agriculture as defined in Section 3(f), it must prevail on this review and consideration of the scope and effect of the exemption afforded by Section 13(a) (10) is unnecessary. May will, therefore, deal with Section 3(f) and rely can the argument in the Brief of Respondents Budd and King Edward (Point II) with respect to the Section 13(a) (10) exemption.

May's employees employed in its packing plant are engaged in agriculture as defined in Section 3(f) of the Fair Labor Standards Act and are exempt under Section 13(a) (6) from the wage and hour provisions of the act.

The Plain Language of the Act.

Section 3, of the Act defines agriculture to include:

"farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities", and any practices "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market" (App'x Pet. Br. 1).

Section 13(a) (6) exempts from the wage and hour provisions of the Act "any employee employed in agriculture (App'x Fet. Br. 2).

The District Court held that the farming exemption ends when the tobacco reaches the receiving platform of the packing house (RK 60). The Court of Appeals in the King Edward and May cases disagreed with this holding stating (RK 93):

"It seems clear to us that a farmer cannot function without a market, that everything done by these farmers was essential for the marketing of their crops and that the work of their packing house employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes 'practices performed by a farmer as an incident to

The Court of Appeals was obviously correct. It is hard to conceive of a case more neatly fitting into the definition of agriculture than that shown by the May record. May owns its farms and handles at its packing plant only its own tobacco grown on its own farms (RK 67, 71). Obviously and concededly, May's raising, harvesting and barncuring of its own tobacco on its own farms is farming. Since the handling in the packing plant is a mere continuation of the curing of the leaf begun in the curing barns on the farm (RK 23, 69), it likewise is farming. In any event, so far as May is concerned, the bulking at the packing plant is a practice incidental to and in conjunction. with its operations on the farm since the plant is merely. the situs at which May completes the curing of its own tobacco exclusively. Finally, the bulking, sorting and packing of the leaf in the packing plant is all part of the preparation of the leaf for market-for without this preparation it would not be ready for market (RK 35).*

Consequently, both as to the activities on the farm and those in the packing plant May meets the statutory tests. It is a farmer, engaged in practices performed by a farmer as an incident to and in conjunction with its farming operations and in preparation of its own "agricultural commodity" for market

Petitioner suggests (Br. 52-53, 57) that the activities at the plant are distinct, highly industrialized processing operations. At the plant, May's employees pile and re-pile

^{*}Although the bulking, sorting and baling are essential steps in the preparation of May's tobacco for market, the statute does not require that they be essential. It suffices it the practices are, in fact, part of the preparation for market.

the leaf, and, at the late stages of the curing, spray it with water to make it moist, soft and pliable enough to handle without breakage (RK 68, 70). This is not highly industrialized processing. It is the simplest kind/of manual labor, performed by the same farm hands who raise the tobacco and hang it in the curing barn (RK 68). The only "process" involved is the "process of natural transformation within the leaf itself" (RK 69), unaided by any external catalyst, chemical or artificial stimulation (RK 69). May's activities throughout are essentially no different from those of a farmer who plucks his fruit unripened and then guides the natural ripening process within the fruit itself by proper exposure to light, heat and moisture.

The Decisions of This Court:

Petitiener relies heavily upon Maneja y. Waialua, 349 U. S. 254. That ease is readily distinguishable. In Waialua, the sugar cans was ground into raw sugar and molasses in its modern industrial sugar mill manned by employees specially trained in its operation (249 U. S. 257, 269). No such specialization and industrialization occurs at May's plant. What goes in as a leaf of tobacco emerges as a leaf of tobacco.

Actually, the opinion in Waialua supports May for several reasons.

First, it recognizes that Whiolog presented a border-line case (349 U.S. 264). If the grinding and machine processing of cane into raw sugar and molasses were clough to lift Whiolog similling activities out of the definition of agriculture, the absence of any such comparable activities suffices to keep May's packing plant activities within the definition. To hold otherwise would be to say that no off the farm activity is embraced within Section 346). Yet, the statute explicitly declares otherwise.

Second, the Court in Wavalua considered seven tests in determining whether an off the farm activity fell within the definition of agriculture in Section 3(1) (349 U. 8, 264-265). Waialua failed to meet at least three, and possibly four, of these tests. May meets them all.

- (a) In May, as in Painter, the farm operations "are substantial, and " " are no mere facade for an otherwise industrial venture" (349 U.S. 264).
- (b) In May, the product resulting from the operation is unchanged. It is still tobaccollect. In Waialna, sugar cane became raw sugar and molasses and yet the Court felt that there was some ground for considering these agricultural commodities usince the unmilled sugar cane is highly perishable and unmarketable as such (349 U.S. 264-265). In May, the commodity is also highly perishable and anmarketable until completion of the curing at the packing plant (RK 35, 69).
- (c) In May, the investment in the farms is so substantial that May has its own packing plant for its bulking activities. Yet, that plant is not so big and extensive that May engages in bulking tobacco grown by others (RK 67, 71).
- (d) In May, obviously as much time is spent in the activities of raising and barn curing as in the bulking (RK 68) at the packing plant.
- (e) In May, the same "ordinary farm workers" do the bulking, sorting and baling at the packing plant (RK 68) whereas in Waindar "the overall picture discloses essentially separate working forces for mill operations and for farming" (349.U. 8, 265).
- (f) In Waialua, the plantation organization had separate departments to handle the processing activities and field work. No such departmentalization is present in the May case.

(g) Finally, in Woodbo, the mill workers were typical factory workers, and the milling operation was an industrial venture. In May, the employees at the packing plant are ordinary farm hands and there is no industrialization.

Despite the fact that Waishaa failed to meet several of these tests, the Court classified it as a "borderline case" (349 U. S. 264); and said that the question was "an extremely close one in gauging whether this milling operation is farming or manufacturing." (349 U. S. 267) and that the position of farmers milling their own sugar "vis-a-vis the agriculture exemption may well be sui generis." The deficiencies of Waishaa emphasize the completeness of May's qualification under Section 3(f) tested by this Court's seven Prelevant factors" (349 U. S. 267). As stated in Waishaa, what occurs in May's packing plant is "merely" a subordinate and necessary task incident to its agricultural operations" (349 U. S. 263).

Moreover, what was said in Farmer's Reservoir & Irrigation Co. v. McComb. 337 U.S. 755, is applicable here. In that case, employees of a mutual non-profit irrigation company supplying water exclusively for farming purposes were held not to be employed in agriculture. Recognizing that irrigation "the activity of this company swould constitute farming if done by a farmer, the Court nevertheless held that this particular company was not entitled to exemption saying:

But the significant fact in this case is that this work is not done by the company's employees (327 U. S. 763).



Congress Shaended Section 13 a 6 four months after this decision.

The opinion went on to stress that practices performed as an incident to or in conjunction with farming afforded an exemption "only if they are performed by a farmer or on a farm" (337 U. S. 766) and pointed out that "the work of the company's employees is done neither on a farm or by farmers" (337 U. S. 767).

These observations are dispositive here not only because May is a farmer but also because May's employees handle its own tobacco at its own packing plant?

Petitioner's Misinterpretation of Legislative History.

Petitioner argues (Br. 42-7, 51-2) that the rejection of the tobacco warehousing amendment proposed by Senator Reynolds of North Carolina and similar angudments in the House indicates a Congressional intention to exclude from the definition of agriculture activities of the kind performed at May's packing plan. Senator Reynolds was referring to seasonal auction warehouses in the State of North Carolina to which growers of non eight tobacco brought their tobacco to have it auctioned off to manufacturers or dealers after the grower had cured and graded it. These warehouses are not in the least comparable to May's packing plant where May performs the second phase of the curing of its eigar tobacco prior to any sale. The disposition of these proposed amendments has, therefore, no significance in determining Congressional intent with respect to Section 3(f).

Petitioner also argues (Br. 52) that the omission of the word processing from Section 3(f) indicates a congressional intent to exclude from the definition of agriculture the kind of activities performed at May's packing plant. But Section 3(f) includes "any practices" performed

See brief of respondents Budil and King E resid. For fixed 1s. and Currin v. Wallace, 306 U. S. 1.7.

by a farmer or on a farm as an incident to or in connection with such tarming operations, including preparation for market The words "any practices" are much broader and all embracing than the word "processing" and, therefore, resulted in a broader definition of agriculture than would have been the case if the more restrictive word "processing" had been used. Moreover, as pointed out (supra, p. 5), there is no processing at May's packing plant in the sense of any manufacturing operation or application of any external catalyst or other chemical or artificial stimulation of the natural curing process within the leafitself. In any event, the debates in the Senate make it clear that the activity of a farmer in preparing his own crops for market, however characterized, was intended to be embraced within Section 3(f) (App'x Pet. Br. 47, 49, 52, 67-8, 76, 80-81).*

Petitioner (Br. 53) also seems to suggest that the omission of the word processing from the definition of employees engaged in agriculture in the bill in its then form indicates a congressional intent to omit from Section 3(f) the kind of activities performed at May's plant. But, the debates themselves show that Mr. Biermann, the sponsor of the proposed amendment defining employees engaged in agriculture, con cuted to the omission of the word "processing" because he felt that, "some Members thought that processing would include the seeking of cotton and wood to textiles and rubber into finished products, and a long list of things of that kind. The amendment I have offered includes only the first processing of things that come off the farm" (App'x Pet. Br. 91.2). Obviously Mr. Biermann

^{*}The Brief of Respondents Build and King Edward has a detailed discussion of the locality chistory. Point I. B) which confirms May's convention that its packing plant activities are within the definition of agriculture.

definition was not meant to embrace persons performing manufacturing operations. Obviously, also, be thought that his amendment without the word "processing" included the initial handling or processing of products as they came off the farm. The debates do not, therefore, support the suggestion that the omission of the word "processing" from what ultilizately became Section Etcape(10) desclosed a congressional intent to restrict the scope of the definition of agriculture in Section 3(f). To the contrary, they show an intent to include within the definition of agriculture the handling of May's tobacco that takes place in its packing plant after it leaves the enring barns.

Prior Departmental Construction of Section 3(f).

On August 21, 1939, the Department of Labor issued Interpretative Bulletin No. 14 (WHM 35-351, et seq.). Section 10 of that Bulletin deals with the term:

"practices " performed by a farmer " as an incident to or in conjunction with such farming operations, including preparation for market, " ","

as used in Section 3(f).

. Subdivision (b) of Section 10 of the Bulletin then states

(b) The term 'preparation for market must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

"10. Tobacco—Handling, drying, bulking, strip ping, tying, sorting, stemming, packing and storing."

Thus, from the very beginning the Department of Labor took the position not only that the activities of the kind

performed at May's packing plant fell within Section 3(f), but also that stripping and stemming did as well. Certainly, so far as May is concerned, the instant dirigation represents a complete departure tenus and abandonment of that Interpretative Pulletin. Yet, this contemporaneous construction of this structure is critical to great weight. United States v. Inversion Tracking Associatings, 310°C S. 534, 549.

To summarize, the plain meaning of the statute, the decisions of this Court constrains it, its legislative history and the construction placed upon it by the Department of Labor itself all establish that May's employers who handle the tobarco leaf at its packing plant and prepare it there for market are employed in agriculture within the meaning of Section 3(f).

Conclusion.

The indepent of the Court of Appeals in favor of respondent May should be affirmed. Alternatively, the King Edward May seriou should be chanded to the District Court for trial.

Respectfully sphultted.

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Suprame Court, U. S.

Supreme Court of the United States

October Tern, 1955.

No. 278

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Petitioner,

KING EDWARD TOBACCO COMPANY OF FLORIDA and MAY TOBACCO COMPANY.

Respondents.

ON WEIT OF CERTIONARY TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF RESPONDENT MAY TOBACCO COMPANY.

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Supreme Court of the United States

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No. 278

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vs.

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MAY TOBACCO COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF RESPONDENT MAY, TOBACCO COMPANY.*

Petitioner's supplemental memorandum says, in effect, that May must suffer for any deficiencies in the record. This can only properly mean the King Edward-May record—not the Budd record, since May was not a party to the Budd action. There are no deficiencies in the proof in the King Edward-May record, in so far as it applies to May.

The only proof of what actually occurs in the May packing plant is in the affidavit of Fred L. May (RK 67-71).

^{*}Petitioner had two weeks prior to the oral argument within which to file a reply brief and in that period found the time to prepare and file a "Supplemental Appendix in Reply."

None of its allegations is denied. It is impossible to read that affidavit without concluding that all of the activities in the packing plant were in aid of the natural curing and fermentation of the leaf in preparation for market and that the piling and re-piling of the tobacco and its ultimate sorting and baling involve simple manual labor and nothing else.

Petitioner also hints that May's is a big industrialized operation. Aside from the fact that size and mechanization are not controlling (Maneja v. Waialua Agricultural Co., 349 U. S. 254, 261), at least 7 other farmers plant a greater acreage than May (RK, 84A). Its packing plant activities are totally lacking in any element of industrialization.

Petitioner's argument that the packing plant activities are incidental to cigar manufacturing is without substance. May is a farmer—not a cigar manufacturer. There is not the slightest suggestion in the record that it is in any way affiliated with any cigar manufacturer. Its packing plant activities are practices of a farmer preparing his tobacco for market. Who its customers are is beside the point.

Petitioner's conclusion, in effect, asks that the judgment be reversed even as to those respondents who can satisfy the Court that their employees come within the exemption of Section 13(a)(6). This suggestion to circumvent the statute is startling, to say the least. It is sought to be justified by the argument that such a holding will achieve the design of the Act. In other words, disregard of part of the Act will accomplish the purpose of the Act. A bizarre sort of interpretation of legislative intent, indeed! If the Court concludes that Section 13(a)(10) does not afford an exemption to owners of packing plants who bulk the tobacco

of others, the remedy is by legislation—not by depriving May of the 13(a)(6) exemption to which it is clearly entitled.

Respectfully submitted,

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Attorney for Respondent, May Tobacco Co.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

JAMES P. MITCHELL. Secretary of Labor.
United States Department of Labor, Petitioner,
vs.

JOSEPH T. BUDD, JR., et al. Respondents

BRIEF, AMICI CURIAE, IN SUPPORT OF RESPONDENTS,

of

National Grange,
National Council of Farmer Cooperatives,
National Milk Producers Federation,
United Fresh Fruit and Vegetable Association,
National Cotton Council of America,
National Cotton Ginners Association, and
National Cotton Compress and Cotton Warehouse
Association.

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INDEX

				Page
Introduction	on Interest of	Amici. Cu	riae	i-4
an in				•
	Involved, And out the Nation	Their Impor	tance	5-6
ARGUME	VT.			
	Administrator			
	a of Production Therefore Inv			7-10
	Administrator a of Production			11.
Est	Unlawful Disc ablishments wit	thin the Onl	y Geographi	c
	a Defined or Pr ninistrator's R		tne 🗳	10-18
(1)	Example of D Cotton Gins	iscriminatio	n Between	14
(2)	Example of Di Non-Compress			15
and the second s				
(3)	Example of Di Compress Wai			otton 15-16
trat	Congress Hasive Definition	of the Area	of Product	tion,
and	Both of the C	riterią Emp	loyed There	in 19-29
1	tions 13(a)(6)			
	ntion of Congr			
	inst the Impac imum Wage an			

INDEX (Cont'd)

			Bold of programme
			Page
III: The Piling an	d Re-Piling o	f Tobaccas	Not .
Manufacturin			
Leaves the To			
Within the M			
			1/2
IV-A: The Section 1	3(a)(6) Exe	motion of A	gricultural
Employment .	Applies to the	Operations	of
Respondents 1			35-40
B: Farmers Have	Relied, And	are Entitle	d to Rely.
Upon the Inte	erpretations of	of the Depar	tment of
Labor in Rega	irding as Exe	mpt Their V	arious'
Farm Activitie	es and Farme	er-Processin	g and
Servicing Act			+0-41
Conclusion .			42
Appendix A—The Re	lative Condit	ion of Ameri	ean ;
Agricul		ion of timeri	43-45
			. 10-10/
Appendix B—Pertine	nt Provisions	of the Paid	
	Standards Act		
as Ame		1 01 1355,	
as anne.	ildeti		46
Amondie C. Poll T.	Section Section		
Appendix C—Full Tex			2
of Prod	Definition of	the Area	
	THE RESERVE AND ADDRESS OF THE PERSON NAMED IN COLUMN 2 IN COLUMN		

TABLE OF AUTHORITIES CITED

	Page
Cases:	
Addison, et al. v. Holly Hill Fruit Products, Inc. (1944) 322 U.S. 607, 614	13, 28
Biddle v. Commissioner of Internal Revenue (1938) 303 U.S. 573, 582	19
Budd, et al. v. Mitchell, 221 F. (2d) 406	6
Helvering v. Reynolds (1941), 313 U.S. 428, 432	19
Jenkins v. Durkin (CA-5, 1954), 208 F. (2d) 941.	9
Koshland v. Helvering (1936), 298 U.S. 441, 447.	19
Lewis v. Union Compress & Warehouse Co. (1955) (No. 39443, S. Gt. of Miss.) Unreported	14
Lovvorn v. Miller (CA-5, 1954), 215 F. (2d) 601	9, 14
Maneja v. Waialua Agricultural Co. (1955), 349 U.S. 254, 260, 268	36, 38
McComb v. Hunt Foods, Inc. (CA-9, 1948) 167 F. (2d) 905, 908; Cert. Den. 335 U.S. 845	29
Puerto Rico Tobacco Mk(g. Cooperative Assn. v. McComb (CA-1, 1950), 181 F. (2d) 697	. 34
Skidmore v. Swift (1944), 323 U.S. 134, 140	. 41
Tobin v. Traders Compress Co. (CA-10, 1952) 199 F. (2d) S, 11; Dissent at page 11	9
Traders Compress Co. v. Tobin (No. 441, Oct. Tern 1952), Cerf. Den. 344°U.S. 909	9, 14
U.S. v. American Trucking Assns., Inc. (1940), 310 U.S. 534, 549.	41

TABLE OF AUTHORITIES CITED (Cont'd)

	Statutes:	-24
	Agricultural Marketing Act. Sec. 15(g); 12 U.S.C. 1141j(g)	36
1	Fair Labor Standards Act of 1938, c. 676, 52 Stat 1060, as amended, c. 736, 63 Stat. 910 (29 U.S 201 et. seq.)	
	Sec. 3(f) (See App. B, p. 46 for text)	5, 35 36
	Sec. 6(a)(1) 1955 Amendments.	6
	Sec. 13(a)(6) (See App. B, p. 46 for text)5, 7, 29, 3	1, 36-37
	Sec. 13(a)(10) (See App. B, p. 46 for text) 5-7, 19-20, 22, 24-2	
	Fair Labor Standards Amendments of 1949, 63 Stat. 910, Sec. 16(c)	3-24, 35
	Portal to Portal Act of 1947, 61 Stat. 88, 89; 29 U.S.C. 258, 259	41
	Reorganization Plan No. 6, 15 F.R. 3174, 64 Stat. 1 Note under 5 U.S.C. 611	263; 4
	discellaneous:	
7	Code of Federal Regulations	
1	Definition of Area of Production, 29 C.F.R. 536.	2
0	Text App. C 47-48 5, 8	. 14. 18
	29 C.F.R. 536.2 (c) prior to Dec. 25, 1946 29 C.F.R. 536.2 (a)(2) Dec. 25, 1946-Dec. 31, 19	34 48 34
	29 C.F.R. 536.2 (13 F.R. 7347) after Dec. 31, 1948	34-35

TABLE OF AUTHORITIES CITED (Cont'd)

Congressional Record		
Vol. 81 pp. 7657, 7659, 7660		38
o pp. 7876, 7877, 7878 (Ju	dy 30, 1937) 24-26	5, 28-32
рр. 7927-7929		39-40
pp> 7947		26
pp. 7949		30
Vol. 83 pp. 7325, 7401, 7408		26-28
Vol. 92 pp. 3169, 3170		20-21
Vol. 95 No. 161, pp. 12804, 12	811.	(1) 22
No. 195, pp. 15201, 152	02	30
House Report 1453, 81st Cong. 1st Conference Report on H.R. 585		22-23
U. S. Dept. of Agriculture		1
Agricultural Situation, Dec. 19 Jan. 1956, Vol. 40	55, Vol. 39;	44-45
Agricultural Statistics 1954		43, 44
Farm Income Situation, Oct. 1 Agricultural Research Service		43-44 44
S. Department of Commerce		
Bureau of the Census		
Cotton and Linters Consumption and Exports, and Active Cot 1955; M15-1-5-56.		

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(Crops 1949 to 1954, Incl.) 14
Population, 1950. 11, 14, 18
Statistical Abstract of the U.S., 1955 44
Office of Business Economics
Survey of Current Business, July, 1955
U. S. Department of Labor, Wage and Hour Division
Annual Reports to Congress, 1939, 1941; 1942-1948.
1950, 1951, and 1954
Area of Production: Cotton Dec., 1944
Findings of the Administrator, Dec. 18, 1946, in the matter of Redefinition of the "Area of Production"
as used in Sections 7(c) and 13(a)(10) of the Fair
Labor Standards Act of 1938; No. D147 (05112)
Sheet 8
Interpretative Bulletin No. 14
Wobston's International Distingers
Webster's International Dictionary:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 278

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, Petitioner,

OSEPH T. BUDD, JR., et al., Respondents.

BRIEF, AMICI CURIAE, IN SUPPORT OF RESPONDENTS,

National Grange,
National Council of Farmer Cooperatives,
National Milk Producers Federation,
United Fresh Fruit and Vegetable Association,
National Cotton Council of America,
National Cotton Ginners Association, and
National Cotton Compress and Cotton Warehouse
Association.

Written consent of all parties to the filing of this brief, amici curiae, has been obtained and filed with the clerk as provided in Rule 27.9(a) of the Court.

Introduction-Interest of Amici Curiae

The National Grange is a national, voluntary, non-profit, general farm organization. Organized in 1867, it is the oldest of the national farm organizations. Its organization includes subsidiary granges in 39 states. Its membership includes 900,000 individual farmers. Its members produce practically every agricultural and horticultural commodity produced in the United States.

National Council of Farmer Cooperatives is an incorporated national, voluntary, non-profit farm organization whose direct members are 121 farmers' marketing and purchasing business associations, and state organizations of such associations. Its membership embraces some 5,000 local associations, and approximately 3,000,000 individual farmers located in all 48 states and Puerto Rico. These farmers produce, and the business associations represented in the Council's membership market, and in many cases store, process and otherwise prepare and service for market, practically every major type of agricultural commodity produced on the farms of America.

National Milk Producers Federation is a national, voluntary, non-profit association representing through its members and sub-members between 600 and 700 dairy farmer cooperatives embracing a membership of approximately 500,000 individual dairy farmers located in every state of the Union except Nevada. All such dairy farmer members produce milk, and in addition to milk, through those dairy farmer cooperatives, produce and market cream, butter, cheese and practically every other dairy product produced and marketed in the United States.

United Eresh Fruit and Vegetable Association is a national, voluntary, non-profit organization composed of and serving all branches of the fresh fruit and vegetable industry. Its membership includes some 2,800 producers, handlers, packagers, wholesalers and shippers distributed throughout the United States.

Nat nal Cotton Council of America is a national, voluntary, non-profit organization whose membership embraces, every segment of the raw cotton industry in all of the cotton-growing states, including cotton farmers, cotton ginners, cotton ware louse and compress-warehouse oper-

ators, cotton-seed processors, cotton merchants and cotton spinners.

National Cotton Ginners Association is a national, voluntary, non-profit association composed of the owners and operators of cotton ginning establishments located throughout the cotton-growing states of the United States, —with the exception of ginners in Arkansas and Missouri which currently are not affiliated with the national association.

National Cotton Compress and Cotton Warehouse Association is a national, voluntary, non-profit association composed of the owners and operators of public cotton warehouse and cotton compress-warehouse establishments located throughout the 14 major cotton-growing states.

Ignoring possible occasional duplications of membership, the above named amici curiae speak for substantially more than four and one-half million American farmers who are directly and personally engaged in agricultural and horticultural production. Their aggregate memberships also include the owners and operators of many thousands of establishments in the United States, in which farmers, horticulturists, farmer cooperatives, or independent entrepreneur bailees for hire are engaged in the handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, and canning of agricultural and horticultural commodities for market, and in making cheese, butter and other dairy products, -that is to say all of the operations on agricultural and horticultural commodities which are subject to exemption from the wage and hour provisions of the Fair Labor Standards Act under the exemption contained in Section 13(a) (10) thereof, -to the extent that such operations are performed within the area of production (as defined by the Administrator).

Unless the Court's decision is specifically limited to pre-

vent that result, any determination of the issue relating to the validity of the Administrative definition of the "area of production" of agricultural and horticultural commodi-· ties (directly or indirectly) will have a serious effect upon the majority if not all of the members of all parties to this brief (except the cotton-seed processor, cotton merchant and cotton spinner members of National Cotton Council of America and possibly some shipper members of United Fresh Fruit and Vegetable Association); -and, similarly, any determination of the issue relating to application of the Section 13(a)(6) exemption of agricultural employment to the packing house operations of respondents May and King Edward may seriously affect the interest of many of the farmers embraced within the memberships of National Grange, National Council of Farmer Cooperatives, · National Milk Producers Federation, and United Fresh Fruit and Vegetable Association.

In this brief, references to the record will be made by the letters "RK" (Record, King Edward Case), "RM" (Record, May Case), and "RB" (Record, Budd Case).

The duty and authority to define the area of production of the various agricultural and horticultural commodities imposed and conferred by Congress upon the Administrator in Section 13(a)(10) of the Fair Labor Standards Act was transferred to the Secretary of Labor (petitioner) by 1950 Reorganization Plan Number 6, 15 F. R. 3174, 64 Stat. 1263, set out in the note under 5 U. S. C. 611. Therefore, the designations "Administrator," "petitioner," and "Secretary of Labor" are used interchangeably herein.

For convenient reference, the provisions of Sec. 3(f), Sec. 13(a)(6) and Sec. 13(a)(10) of the Act are reproduced in Appendix B; and the text of the Administrator's definition of the area of production is reproduced in Appendix C hereto.

The Issues Involved, and Their Importance Throughout the Nation

As between the parties hereto, this cause presents two questions which may be narrowly stated within the limits of the case at bar as follows:

- 1: With respect to the complete exemption from the minimum wage and overtime requirements of the Act contained in Section 13(a)(10) thereof for "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ... drying, (or) preparing in their raw or natural state, ... of agricultural ... commodities for market"; —and with respect to the purported definition of the area of production of all agricultural and horticultural commodities promulgated December 25, 1946 (29 C. F. R. 536.2): Is petitioner's definitive regulation rendered invalid because it provides that no individual engaged in performing the named operations will be considered as employed within the area of production of the commodity involved if he is so employed in or near a place of 2500 or greater population?
- 2: Does the complete exemption from the minimum wage and overtime requirements of the Act granted by Section 13(a)(6) thereof to any employee employed in "agriculture" (defined in Section 3(f) thereof to include "any practices. performed by a farmer. as an incident to or in conjunction with. farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.") extend to the piling, storing, drying, handling, and packing for market of U.S. Type 62 shade-grown tobacco by May and King Edward (the farmer-producers of such tobacco)?

The Court of Appeals has answered both questions in the affirmative (221 F. (2d) 406, 410-411).

3: A third question involved (which the Court of Appeals also decided in the affirmative) is whether respondents' packing house operations (the storing, piling, drying, packing, and otherwise handling for market of U.S. Type 62 tobacco) are included among the operations enumerated in Section 13(a)(10).

The importance and effects of this Court's determination of those questions upon review will extend (far beyond the production, handling, storing, piling, drying, and packing for market of U. S. Type 62 shade-grown tobacco in the vicinity of Quincy, Florida) to the production and essential servicing for market of virtually every agricultural and horticultural commodity, and virtually every farmer and horticulturist, in the United States. The force of impact of such determination upon United States agriculture and horticulture, and the essential servicing of agricultural and horticultural commodities for market, will be tremendously increased by the increase of the minimum wage provided in the Act from 75c to \$1.00 per hour effective March 1, 1956 (P. L. 381, 84th Congress, 1st Session; 29 U. S. C. 206 (a)(1)).

ARGUMENT

I-A: The Administrator's Definition of the Area of Production is Ultra Vires, and therefore Invalid and Void

As more fully developed in Part II hereof, the Congress, in enacting the Act, evidenced a clear intent to protect and exempt the farmer and the horticulturist from any impact of the minimum wage and overtime requirements, not only with respect to actual agricultural production, but also with respect to the services necessary or incidental to the marketing of their crops.

Section 13(a)(6) of the Act provides such exemption for agricultural production, broadly defined to include all operations performed either by a farmer or on a farm as an incident to or in conjunction with agricultural production. By Section 13(a)(10), that exemption was extended to a comprehensive series of specified operations which are necessary to the marketing of farm and orchard products, -regardless of where or by whom such operations are conducted, so long as they are conducted within an area of agricultural production of the commodity or commodities involved. As an afterthought, it was inferentially provided in the conference report, and enacted without explanation or discussion, that the Administrator should, for the purposes of the exemption, define the area of production of each of the various agricultural and horticultural commodities. There was no suggestion, or reason to suspect, that the Administrator would do otherwise than simply outline the geographic boundaries of the areas within which various farm and orchard products are grown, or that the Administrator would not perform this function as an impartial agent of Congress and carry out its intention with respect to this exemption.

The respective Administrators, however, have proved to be—not impartial administrators, conscientiously undertaking to carry out the will of Congress—but ardent partisans and advocates of extension (both by legislation and by administrative fiat) of the minimum wage and overtime requirements to every possible individual.

Successive administrators have repeatedly urged Congress to repeal this exemption in its entirety (Annual Reports of the Administrator and of the Wage & Hour Division to Congress, 1939, 1941, 1942-1948, 1950 and 1951). The successive administrators proceeded meanwhile toissue successive regulations (published in Title 29, Chapter V, Part 536.2, Code of Federal Regulations), purporting to define the area of production of all agricultural and horticultural commodities. They did so with combinations of arbitrary and unrealistic criteria designed to restrict application of the exemption to the fewest possible workers. Thus the area of production of agricultural and horticultural commodities (generally, not separately) has successively been defined by the Administrator by use of criteria having no rational or necessary relation to the geographic boundaries of the areas of agricultural production of the respective farm and orchard products. This has been done (a) in terms of the distance which commodities move to reach the plants at which the named operations are conducted, (b) in terms of the number of persons engaged in the named operations, (c) in terms of the populations of places where the operations are conducted, and (d) in terms of the populations of places from which farm and orchard products are transported to such establishments. The current definition combines such a distance test with a population test applied both to plant location and to the points from which commodities are received for servicing. In the instance case the distance test is not directly in issue because respondents' operations comply with its terms.

To approve the population test of the Administrator's definition, which is directly in issue, would impute foolishness or futility to a clear, conscious and deliberate enactment of the Congress. As stated by Judge Pickett, dissenting in *Tobin v. Traders Compress Company* (199 F. (2d) 8, at p 11):

"Generally the population of a city or town has no reasonable relation to the question of whether the plant is located within an area of production. The purpose of the Act was to grant an exemption which was thought to be helpful to the farmers and horticulturists, and it was not intended that the statutory exemption should be made ineffective or completely destroyed by regulation."

That conclusion was adopted and approved by the Court of Appeals for the Fifth Circuit in Jenkins v. Durkin, 208 F. (2d) 941 (1954) and in Lovvorn v. Miller 215 F. (2d) 601 (1954), as well as in the instant case.

The majority opinion in *Tobin v. Traders Compress Company* is the only instance in which any court has approved the administrator's current definition. As an essential basis for its decision, that majority opinion contains the finding (199 F. (2d) 8, 11) that:

"To be sure, the population test does not effect discrimination between plants in the same geographical area, as did the number of employees test condemned in the Addison Case."

The quoted finding was completely without support inand in fact contrary to—the record (*Traders Compress* Company v. Tobin, No. 441 in the Supreme Court of the U. S., October term, 1952, Petition for Rehearing of Order Denying Petition for Writ of Certiorari, section 1, pp. 2-3, and evidence there cited).

That the population test of the Administrator's definition produces anlawful discrimination is clearly shown in the following sub-part (I-B):

I-B: The Administrator's Definition of the Area of Production Produces Widespread and Unlawful Discrimination Between Establishments within the only Geographic Area Defined or Prescribed In the Administrator's Regulation

Because neither the time available nor a reasonable length of this brief will permit exhaustive analysis of the data susceptible of judicial notice concerning all agricultural and horticultural commodities, this discussion will treat with cotton as illustrative of the situation existing with respect to the operations named in the Section 13(a)(10) exemption to apply to such commodities generally.

In "Area of Production: Cotton," December 1944, U.S. Department of Labor, Wage and Hour and Public Contracts Divisions, Economics Branch, it was indicated that:

1: Of 12,033 active cotton gins in the cotton-growing states, 1,362 gins og 11.4% were inside the corporate limits of places having 2,500 or greater population (1940 census) (p. 32, Table 23).

2: Of 1,202 non-compress cotton warehouses in cotton-growing states, 596 or 49.6% were located in places of 2,300 or greater population (1940 census) (p. 33, Table 24).

3: Of 320 cotton^o compress-warehouse plants in the cotton-growing states, 263 or 82.2% were located in places.

of 2,500 or greater population (1940 census) (p. 35, Table 25).

Sources cited for these data are: Bureau of the Census, Population 1940, and unpublished data for distribution of cotton gins for the crop year 1943; and Cotton Fire & Marine Underwriters Classification of Cotton Compresses, Warehouses and Wharves for the spason 1944-45.

The same sources (Bureau of the Census, Population 1950, and unpublished data for distribution of cotton gins for the crop year 1954, and Cotton Fire & Marine Underwriters Classification of Cotton Compresses, Warehouses and Wharves for the season 1955-56) show the current situation to be as follows:

- 1: Of 7,069 active cotton gins in cotton-growing states, more than 1,056 gins or 14.9% are located in places of 2,500 or greater for ulation (1950 Census).
- 2: Of 1,252 non-compress cotton warehouses in cotton-growing states, 710 or 56.7% are located in places of 2,500 or greater population (1950 Census).
- 3: Of 299 cotton compress-warehouse plants in cotton-growing states, 253 or 84.6% are located in places of 2,500 or greater population (1950 Census).

Public cotton storage capacity (as reflected by the volumes of obtton on hand in public storage December 31, 1955) is so distributed in the cotton-growing states that the aggregate storage capacity of cotton warehouse plants and cotton compress-warehouse plants located at places having 2,500 population or more (1950 Census) is proportionately greater than the aggregate number of such plants indicated under 2 and 3, above. (Same current suthorities, plus un-

published data of Bureau of the Census concerning distribution of cotton in public storage.)

In issuing his current definition of the area of production of agricultural and horticultural commodities, the Administrator admitted that his regulation would exclude from the defined area of production about 10% of all grain elevators because they were located in towns of 2,500 or greater population (1940 Census),—and that his definition for the same reason would exclude from the defined area of production about one-third of all fresh fruit and vegetable packing and canning, cheese manufacturing and poultry and egg assembling establishments. ("Findings of the Administrator, December 18, 1946, In the Matter of the Redefinition of the area of production as used in Sections 7(c) and 13(a)(10) of the Fair Labor Standards Act of 1938," U. S. Department of Labor No. D-147(05112), sheet 8).

In the 1948 Annual Report of the Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, the Administrator estimated that, as of September 1947, under his (the present) definition of the area of production of agricultural and horticultural commodities, only 336,000 (28%) of the 1,200,000 employees engaged in the operations named in the Section 13(a)(10) exemption "may qualify for the exemption" (pp. 84, 124-125, Table 23). Table 23 of that report indicates that the proportions of employees engaged in the various operations who "may" be exempt under Section 13(a)(10) ranged from a maximum of 70% of the persons employed in grain elevators and in the country buying of grain, to a low of 4% of the persons

¹In the 1954 Annual Report of the Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, at p. 58, the Administrator states that "233,000 (19.4%) are (exempt because) engaged in handling or processing agricultural commodities in the area of production."

employed in the wholesaling of dairy products. The report gives no indication of the extent to which these results are attributable to the 2,500 population test, to the application of the mileage or distance test, or to the application of both tests combined.

At pp. 130-131 of that report, the Administrator evidenced complete lack of sympathy and respect for the Section 13(a)(10) exemption and other exemptions granted in the Act; and clearly indicated that the administrative policy with respect to Section 13(a)(10) and such other exemptions is, not to carry out the purposes of the exemptions, but rather to apply the general purposes of the Act to the fields covered by specific exemptions.

It is clear that the Congress had no intention whatever of authorizing or permitting the Administrator, by means of his definitive regulation, to discriminate between establishments located within the geographical area defined by such regulation (Addison et al. v. Holly Hill Fruit Products, Inc. 322 U. S. 607, 614; 64 S. Ct. 1215, 1220 (1944)).

In the 1954 Annual Report of the Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, at p. 36, the Administrator, in discussing the evidence received in his 1951 public hearings (conducted for the purpose of a possible redefinition of the area of production), with apparent approval quoted the following conclusion of the presiding officer at such hearings: "The record contains uncontroverted evidence of the discriminatory effects of the present definition of area of production." Here, for the first time, is a clean-cut admission by the Administrator of uncontroverted evidence that discrimination is created by his definitive regulation in and of itself.

The authorities cited in the footnote² provide the bases for construction of the following specific examples of the discrimination created by the Administrator's definition between establishments within the only geographic area prescribed therein with respect to each of the three cotton-handling operations³.

(1): Example of Discrimination Between Cotton Gins

The town of Slaton, Texas (population 5,036, 1950 Census) is located in Lubbock County which in 1954 produced more cotton than any other county in the United States ("Cotton Production in the United States, Crop of 1954" Bureau of Census). Four cotton gins are located in Slaton.

If the circle of ten airline miles radius prescribed for cotton gins by the Administrator's definition of the area of production is drawn with Slaton, Texas as its center, there are included within that ten mile radius (but more than one airline mile from the corporate limits of Slaton): 2 gins in the village of Wilson (population 265), and one gin each in the villages of Posey (population 25), Southland (population 210), Union (population 15) and McClung (population too small to be recorded by the Census).

²The current issues and records of the authorities cited in "Area of Production: Cotton," December 1944, Wage and Hour and Public Contracts Divisions, Economics Branch, U. S. Department of Labor (Cotton Fire & Marine Underwriters "Classification of Cotton Compresses, Warehouses and Wharves" for the 1955-56 season, Bureau of the Census, Population 1950, and unpublished records of the Bureau of the Census concerning geographical distribution of cotton gins in the cotton-growing states), plus Bureau of the Census "Cotton Production in the United States," Crops of 1949 to 1954 and the Administrator's definition of the area of production (29 C.F.R. 536.2).

³(Specific examples of such discrimination between cotton compress-ware-house plants are shown more completely in the record in Traders Compress Company v. Tobin. No. 441 in the Supreme Court of the United States. October term 1952-R. 145, 147, 243-249, 253-257, 342; and in the record in Lewis v. Union Compress & Warehouse Contpany, No. 39443, in the Supreme Court of Mississippi (1955) (R. 19-20). The example with respect to non-compress cotton warehouse is fully developed (R. 23) in Louvonn v. Miller, No. 14894, in the U.S. Court of Appeals for the 5th Circuit (1954) 215 F. (2d) 601).

(2): Example of Discrimination Between Non-Compress Cotton Warehouses

Athens, Alabama (population 6,309, 1950 Census) is located in Limestone County, which in 1953 produced 65,257 bales of cotton, and in 1954 31,211 bales of cotton. (Although the smallest county in the state, Limestone County during the five years ending with crop-year 1953 produced more cotton than any other county in the state except one adjoining county, and more cotton per square mile of county area than that adjoining county.) Three non-compress public cotton warehouses are located in Athens.

If the circle of 20 airline miles radius prescribed for non-compress cotton warehouses by the Administrator's definition of the area of production is drawn with Athens, Alabama as its center, there are three other public non-compress cotton warehouses located within that 20 airline miles radius, but more than one mile from the corporate limits of Athens, which warehouses are located, respectively, in the villages of Rogersville (population 531), Madison (population 530) and Elkmont (population 179).

(3): Example of Discrimination Between Cotton Compress-Warehouse Plants

Greenwood (population 18,061, 1950 (nsus) is located in Leflore County, Mississippi. During the five crop years ending with 1953 the State of Mississippi produced one-third more cotton per square mile of state area than any other state in the Union. Greenwood is located in and surrounded by those Mississippi Counties which consistently produce more cotton each year than any other counties in Mississippi. In volume of cotton production Leflore County consistently ranks fifth among the 82 Mississippi counties

(rourth in volume of cotton produced per square mile of county area during the period 1949-1953). Three public cotton compress warehouse plants are located in Greenwood.

If the circle of 50 airline miles radius, prescribed for cotton compress warehouse plants by the Administrator's definition of the area of production, is drawn with Greenwood, Mississippi as its center, there are also located within that 50gaile radius, but more than one mile from the corporate limits of Greenwood, three other public cotton compress warehouse plants located in towns of less than 2,500 population, namely: Inverness (population 1,010), 41ta Bena (population 1,725), and Ruleville (population 1,521).

Even if all of the cotton received at each of the cotton gins, non-compress cotton warehouses and cotton compresswarehouse plants mentioned in the above illustrations is grown, and received at those establishments from points; within the respective circles having radii of 10, 20 and 50 airline miles arbitrarily prescribed by the Administrator's definition of the area of production, the 2,500 population test of the administrator's definition, in and of itself, arbitrarily excludes from the defined area of production of cotton the four cotton gins, the three non-compress cotton warehouse and the three cotton compress warehouse plants located at the centers of the three respective circles described, but includes within the defined area of production of cotton by other six cotton gins, three non-compress cotton warel ases and three cotton compress-warehouse plants which are also included within those three respective gircular areas prescribed by the Administrator's Mefinition. If there is a continuation of the recent trend of population to shift from farms to towns and cities, more

These examples would show the same results if the prescribed circles were drawn about the gin, warehouse and compress warehouse locations having populations less than 2,500

and more locations of cotton gins, non-compress cotton warehouses and coston compress warehouse plants, with each successive census, will be arbitrarily excluded from the area of production of cotton as defined in the Administrator's regulation, —by a factor (population) which has no rational or necessary relation to the fact, or the area, of cotton production.

. The authorities previously cited show; (a) that from 10.5% (Tennessee) to 26.9% (Virginia) of all cotton gins in the cotton-growing states are excluded from the defined area of production by the population test alone; (b) that from zero percent (New Mexico) to 100% (Arizona, Florida and Virginia) of all non-compress cotton warehouses in the cotton-growing states are excluded from the defined area of production by the population test alone; and (c) that from 62% (Mississippi) through more than 80% (Arizona and California), through 90% or more (Louisiana, Oklahoma, Tennessee and Texas) to 100% (Alabama, Georgia, New Mexico, North Carolina and South Carolina) of all cotton compress warehouse plants (again without regard to the distance test on cotton receipts) are arbitrarily excluded from the defined area of production of cotton by the 2,500 population test of the Administrator's definition. Thus it is quite impossible for any cotton farmer in Arizona, Florida or Virginia to store his cotton in a non-compress cotton warehouse within the defined area of production of cotton. Similarily, it is quite impossible for any cotton farmer in either of the states of Alabama, Georgia, New Mexico, North Carolina or South Carolina to have his cotton crop stored or otherwise serviced in a cotton compress-warehouse plant within the administratively defined area of production of cotton. 4

The latest available data show that more than 99.9% of all cotton on hand in public storage in the United States

as of December 31, 1955 was stored in non-compress cotton warehouses and in cotton compress warehouse plants located in the cotton-growing states ("Cotton and Linters Consumption, Stocks, Imports and Exports, and Active Cotton Spindles": Dec., 1955; Bureau of the Census, Series M15-1-5-56 Ssued January 20, 1956).

Such discrimination between cotton gins, warehouses and compress-warehouse plants, and between plants engaged in handling, packing, storing, pasteurizing, drying, canning, and preparing in their raw or natural state, of other farm and orchard products for market, and in making cheese, butter and other dairy products,—in practical effect is discrimination between the agricultural producers of those products because the producer bears the costs of conducting such operations.

If the 15-mile circle prescribed for operations on fresh fruits and vegetables (by Sec. i (ii) of the Administrator's definition) is drawn around fruit-packing facilities in Lodi, San Joaquin County, California, (population 13,798, 1950 Census), there are included within that 15-mile radius (but more than one mile from the corporate limits of Lodi) the fruit-packing facilities in the village of Victor, California (population 400, 1950 Census). Among the various operations named in the Sec. 13(a)(10) exemption, such instances of unlawful discrimination created by the population test of the Administrator's definition can be multiplied by hundreds, and probably thousands.

By arbitrarily withholding application of the exemption from operations conducted in or near places of 2,500 or greater population, the Administrator's definition increases the marketing costs of all farmers who rely (and often must rely) for the essential servicing of their crops upon facilities located in or near places of 2,500 or greater popu-

lation. If given effect, the Administrator's definition will nullify the exemption provided by Congress for such service establishments and for all farmers who patronize (and often must patronize) them.

I-C: The Congress has Disapproved the Administrative Definition of the Area of Production, and Both of the Criteria Employed Therein

Part I-B, pages 32-35 of petitioner's brief is devoted to argument that, by failing to deprive the Administrator of the power to define the area of production of agricultural and horticultural commodities, the Congress in effect, has approved the Administrator's definition. The facts require a contrary conclusion.

Subsequent amendment of the Act, without amending the Section 13(a)(10) exemption or revoking the Administrative definition, cannot by any stretch of the imagination be construed as Congressional approval, tacit or otherwise, of the strained and unnatural construction placed upon that exemption by the Administrator, or of any of the various administrative definitions of the area of production, or of the criteria of population, and distance (of commodity movement), employed in the present and parlier definitions.

"Where the law is plain the subsequent re-enactment of a statute does not constitute adoption of its administrative construction." Biddle v. Commissioner of Internal Revenue (1938), 303 U. S. 573, 582; Koshland v. Helvering (1936), 298 U. S. 441, 447; Helvering v. Reynolds (1941), 313 U. S. 428, 432.

Petitioner overlooks the fact that, during the second session of the 79th Congress (92 Cong. Rec. 3170, April 5,

1946) the Senate adopted S. 1349 which would have made various amendments to the Act. The session ended before that bill has acted upon by the House, and the bill therefore never became law. On April 5, 1946, Senator Wiley of Wisconsin proposed an amendment from the floor, which was adopted by the Senate, and passed by the Senate with the bill, which would have amended Section 13(a)(10) by transferring from the Administrator to the Secretary of Agriculture the power and the duty to define the area of production of farm and orchard products. In support of his amendment; Senator Wiley said:

'It has been suggested by the Administrator that the term 'area of production'—with respect to the various agricultural and horticultural commodities—is impossible to define.

"I submit, Mr. President, that the 'area of production' concept has not been given a fair trial. No effort has been made to formulate definitions which are realistic, which take account of the facts and conditions surrounding the production, processing, and marketing of agricultural and horticultural commodities, and which would give effect either to the letter or the spirit of the provisions of these exemptions as contained in the effective act.

"With the exceptions of dry edible beans and Puerto Rican leaf tobacco, the Administrator has made no effort to issue separate definitions for different commodities, despite the great differences between the actual areas of production of the various commodities.

"The definitions which the Administrator has issued have been strained and unrealistic and clearly designed to restrict the application of the exemption to the fewest possible number of persons engaged in the occupations named in the exemptions. This has been done by restricting the definition to occupations on the farm on which the commodities are produced, by decoming area of production in terms of the distance which commodities more from the farm to the plant at which they are handled, in terms of the number of persons engaged in the named offerations in terms of the population of the towns where the processing establishments are located. The courts, including the United States Supreme Court, have quite properly held such definitions invalid, because, it given effect, they would frustrate the intention of the Congress in enacting the exemptions.

The strained, unrealistic, and improper definitions which have been issued probably are, to a considerable extent, the result of ignorance on the part of the Administrator and his staff with respect to the circumstances and conditions of the actual production, harvesting, processing, and marketing of agricultural and horticultural commodities. It can scarcely be doubted that they are also, in part, the result of the intent of the Administrator to nullify—in so far as possible—the exemptions granted by the Congress." (Emphasis added.) (92 Cong. Rec. 3169-70)

The Senate promptly adopted Senator Wiley's amendment. (92. Cong. Rec. 3170).

Petitioner's brief mentions the fact that three years later, when it voted on amendments to the Act (H. ''. 5894, substituted for the provisions of H. R. 5856, and passed by the House August 11, 1949), the House of Representatives adopted the identical amendment proposed by Senator Wiley and adopted by the Senate in connection with S. 1349 in 1946. However (except by inference at pp. 148-153 of the separate appendix to his brief), petitioner also overlooks the fact that a corresponding amendment (having identically the same purpose with respect to cotton), and actually defining the area of production of cotton, was adopted by the Senate.

As indicated in the separate appendix to petitioner's brief, pp. 134-153, the identical amendment adopted by the House in H. R. 5894 (and in S. 1349 by the Senate in 1946), transferring the defining authority to the Secretary of Agriculture, had been proposed in the Senate by Senator Stennis. Due to the opposition of (and to) the then Secretary of Agriculture, the amendment was not adopted by the Senate in 1949. (Actually the amendment was never offered on the floor of the Senate). Because of this situation, Senator Eastland of Mississippi proposed an amendment to Section 13(a) of the Act providing that neither the minimum wage nor the overtime requirements should apply to

the employees of any employer engaged in the ginning, storing, or compressing of cotton, or in the processing of cotton seed: provided. That such employees are employed in about, or in connection with such operation. For operations, conducted in any county in which cotton is produced as shown in the most recent annual cotton production report of the Bureau of the Census."

That amendment was promptly adopted by the Senate, and passed with the bill by the Senate (Cong. Rec. Aug. 31, 1949, Vol. 95, No. 161 pp. 12804, 12811). The purpose and effect of that amendment (like the Wiley amendment of 1946 and the amendment adopted by the House in 1949) were clearly to rebuke the Administrator for the criteria employed in defining the area of production of farm and orchardsproducts, and also to provide a Congressional definition of the area of production of cotton. Therefore, petitioner clearly errs in stating (p. 147, separate appendix to his brief) that "The bill passed by the Senate made no changes in the 'area of production' exemption',—as the managers on the part of the House erred (p. 28, Conference Report on H. R. 5856, Rpt. No. 1453, H. R. S1st Cong. 1st Sess.) in saying that: "The Senate amendment made no

change in eyisting law." In actual substance, the facts are to the contrary, as indicated on page 29 of that Conference Report. In substance, the purpose, and the effect, of the Senate (Eastland) amendment quoted above (and described on page 29 of the Conference Réport) clearly were to extend the area of production exemption of Section 13 (a) (10) to the processing of cotton seed, and to define the area of production of cotton.

(The separate appendix to petitioner's brief (pp. 148-153) indicates how Senator Fulbright of Arkansas expressed the disapproval of cotton states Senators of the conference committee action of deleting both the House amendment and the Senate amendment, pointing out that they had an identical purpose with respect to cotton.)

Contrary to the argument of petitioner, and contrary to the authorities cited at the bottom of page 35 of his brief, it is nevertheless true that, on every appropriate occasion since original enactment of the Kair Labor Standards Act, each House of Congress has adopted an amendment rebuking the methods and criteria employed by the Administrator in defining the area of production, and depriving him of that power (on one occasion by the Senate with respect to cotton only, and on one occasion by each House of Congress with respect to all farm and orchard products). In the first instance the amendment failed of enactment because Congress adjourned before the bill was considered ; in the House of Representatives. In two later instances such amendments failed of enactment partly because of the objections of (and to), the then Secretary of Agriculture, and partly because of the dubious exercise of the technicalities of conference committee procedure.

Petitioner gravely errs in arguing (Br. pp. 14, 35) that Sec. 16(c) of the Fair Labor Standards Amendments of 1949 (63 Stat. at 920) "affirmatively approved" his definition. Those 1949 amendments re-enacted Section 13(a) (10) without change. The general continuance by Sec. 16(c) of the then current administrative regulations is qualified by the words: "... except to the extent that any such ... regulation (or) interpretation ... may be inconsistent with the provisions of this act. ...". The Administrator's (petitioner's) definition was, and is, inconsistent with the provisions of that Act, and was, and is, therefore, excepted from the "approval" of Sec. 16(c) of the amendatory act.

In all fairness, no one can say that the Congress, or either house thereof, has approved, tacitly or otherwise, the Administrator's (petitioner's) definition, or either of the criteria employed therein. In all fairness, no one can deny that on each occasion when it has had an appropriate opportunity to do so, each house of Congress has clearly expressed disapproval of the Administrator's (petitioner's) definition, and undertaken to deprive him of any power to define the area of production (either of cotton or) of any agricultural or horticultural commodity.

SENATOR REYNOLDS: "I gathered from the terms of the Amendment that it would actually remove from the provisions of the bill the larger cold-storage plants throughout the country. Of course many of them we find in the cities of New York. Chicago, St. Louis. San Francisco, and Seattle." (Emphasis added)

SENATOR SCHWELLENBACH: "Those are not in the immediate production area."

SENATOR REYNOLDS: "But they would be in-

SENATOR SCHWELLENBACH: "No Senator, they would not be included because they are not in the immediate production area." (81-Cong. Rec. 7877) (Emphasis added.)

SENATOR CONNALLY: "Mr. President, I should like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territory? There is no limit. The condition is that they are packing plants, and if they are, they are exempt."

SENATOR SCHWELLENBACH: "If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the immediate production area, it would be exempt." (Emphasis added)

SENATOR CONNALLY: "My understanding is that the largest apple-packing plant in the world is located in Winehester, Va., right in the heart of a great apple-producing region. That would be exempt, would it not?" (Emphasis added)

SENATOR. SCHWELLENBACH.: "If the work done in that plant is as described in the amendment, it would be exempt." (NOTE: Winchester, Va. 1930 Census had a population in excess of 10,800). (Emphasis added)

SENATOR SCHWELLENBACH: "The purpose of the amendment is not for the protection of the packing plant or for the protection of the owners of the packing plant. The cost is paid by the producer. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill." (Emphahis added) (81 Cong. Rec. 7877)

The Section 13(a)(10) exemption, as enacted, was extended far beyond Senator Schwellenbach's original intention to confine the exemption to fresh fruits and vegetables and to "agricultural operations." The Schwellenbach amendment was very substantially amplified, especially by the amendments of Senator Borah and of Representative Biermann.

Senator Bornh's amendment, which was offered at 81 Cong. Rec. 7877 and adopted at 81 Cong. Rec. 7947, exempted from the overline requirement the receiving, proc. Essing and manufacturing of milk, cream and butter by farmer cooperatives "in dairy production areas." In the exemption as finally enacted; reference to farmer cooperatives was deleted, and the exemption was applied to both the minimum wage and the overtime requirements, and to the making of "cheese or butter or other dairy products" within the area of production.

In the final form in which enacted, Section 13(a)(10) was substantially a combination of the Biermann amendment (adopted on the House floor) and the Borah amendment (adopted on the Senate floor), separated from the definition of "agriculture" and set up as a separate and distinct exemption. The Biermann amendment was proposed at 83 Cong. Rec. 7325 and adopted by the House at 83 Cong. Rec. 7408.

The exact provisions of the Biermann and Borah amendments are as follows:

The Biermann amendment:

"Strike out subsection (g) of Section 3 (the Schwellenbach amendment as approved by the House Labor Committee) and insert in lieu thereof: (g) 'employees engaged in agriculture' includes individuals employed within the area of production engaged in the handling, packing, storing, ginning, compressing, processing, pasteurizing, drying, or otherwise preparing agricultural commodities for market."

The Borah amendment:

And provided further that the provisions of this paragraph (c) shall not apply to employees employed in a plant located in dairy producing areas, in which

milk, cream or butter fat are received, processed, shipped, or manufactured if operated by a cooperative association as defined in the Farm Credit Act of 1933—."

In discussing his amendment Mr. Biermann, among other things, said:

"The important thing is that the farmer pays the bill for this processing. When the cost of making butter, when the cost of making cheese, when the cost of ginning cotton increased, the farmer gets just so much less; and our contention. is that this bill, designed to help labor, should not be so worded that it puts another burden on the agriculture of this country." (83 Cong. Rec. 7401). (Emphasis added)

The above, and similar statements made by the authors in the course of debates on this exemption, demonstrate the conviction of the authors of the exemption (a), that the farmers pay (or bear in the form of reduced prices for their crops) the costs of performing the operations named in Section 13(a)(10); (b), that the farmers would bear any increase in such costs resulting from application of the minimum wage and overtime requirements of the act to such operations;—and, (c) that this is especially true when such operations are performed within a geographic area characterized by agricultural production of the commodity or commodities involved.

The clear language of Section 13(a)(10), and its legislative history, demonstrate the purpose of Congress to exampt the operations named therein whenever those operations are performed within an area characterized by the growing of the commodity or commodities involved and thus, at least to that extent, prevent the wage and overtime requirements of the Act from increasing the costs borne by farmers and horticulturists incident to the marketing of their crops.

In its decision in Addison et al., v. Holly Hill Fruit Products, Inc. (322 U. S. 607 at p. 615) the Supreme Court quoted a remark of Representative Biermann on the House floor concerning labor differentials between large cities and small towns. Mr. Biermann's remark obviously related to the abortive consideration of minimum waxe legislation during the preceding session of Congress in which extensive consideration had been given (in the fixing of a minimum wage) to the establishment of regional wage differentials. In any event the Court correctly concluded in footnote 8): "Certainly Mr. Biermann did not give the remotest intimation that the 'area of production' was meant to convey any idea other than that which area usually conveys."

What Mr. Biermann meant by use of the term "large city" was made clear on the same page of the Congressional Record:

"I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding the big factories in Jersey City, New York City and some of the other large cities, by the same token we who come from the farm areas are best qualified to say what terms should apply to labor in those areas." (83 Cong. Rec. 7401)

As noted above herein, Senator Schwellenbach also indicated that, while the cold storage of fruits and vegetables in New York City, Chicago, St. Louis, San Francisco and Seattle would not be subject to his exemption, the reason for exclusion from the exemption was not the size of those cities but the fact that they were not within the area of production. (81 Cong. Rec. 7877). He categorically stated that the packing of apples in Winchester, Va., in the center of "a great apple-producing region" would be exempts.

(because Winchester is in the area of production, and regardless of the fact that the population of Winchester was more than 10,000) (SI Cong. Rec. 7877).

II: Sections 13(a)(6) and 13(a)(10) Express the Intention of Congress to Protect the Farmer Against the Impact (direct or indirect) of the Minimum Wage and Overtime Requirements

*The fundamental error of petitioner's position with respect to the Section 13(a)(6) and Section 13(a)(10) exemptions is that he refuses to recognize that those exemptions establish a clear Congressional policy,-separate and distinct from-and (within the scope of those exemptions). diametrically opposed to—the general policy of the Act,namely, to exclude from the scope of the Act's requirements both (a) every practice performed by a farmer or on a farm in connection with farming operations, and (b) all of the operations named in Section 13(a)(10) (necessary to the marketing of farm and orchard products) when performed (by anyone) within an area characterized by gricultural production of the commodity or commodities involved. That policy of exclusion from the Act's requirements is the controlling Congressional policy in construing and applying those exemptions.

If a given employment or operation (as here) is within the letter and the spirit of either exemption, the Congressional policy of exclusion applies,—not the general policy of the Act. In such circumstances the exemption, or exclusion, of itself, is "remedial" in nature and should be liberally construed. See McComb v. Hunt Foods, Inc. (C. A.—9, 1948) 167 F. (2d) 905, 908; Cert. Den. 335 U. S. 845.

Even Sena or Pepper, floor manager for the 1949 amendments, and one of the group of Senators seeking repeal or

restriction of these exemptions, stated just prior to the adoption of the conference report which reenacted Section 13(a)(10) intact:

think it is the consensus of opinion of the conferees that they hope the Wage and Hour Administrator will constantly endeavoy to improve the definition of area of production, and, especially in the case of cotton, that he will apply it as liberally as possible." (95 Cong. Rec., Oct. 18, 1949, No. 195, pp. 15201-2)

Neither bill, as it originally passed either the House or Senate, conferred any authority upon the Administrator to define the area of production of any farm or orchard product. That authority in its present form was inserted in the Act by the conference committee, apparently as an after-thought, without discussion or explanation, and was adopted with the conference report by each house of Congress, without discussion or explanation.

The Congressional debates in both houses of Congress, preceding enactment of the Fair Labor Standards Act in 1938, produced many expressions of solicitude for the economic plight and welfare of the farmer, and of determination to protect all farmers and horticulturists, so far as feasible, from any increase in the costs of producing or marketing their crops (and from any decrease in the prices received for their crops) caused by the application of the minimum wage or overtime requirements of the Act.

Senator Schwellenbach of Washington was the author of the Senate floor amendment exempting the packing, storing, and preparing of fresh fruits and vegetables (81 Cong. Rec. 7876) which was adopted in the Senate (81 Cong. Rec. 7949).

Most of the Senate debates related to off-the-farm serv-

bles in general. Senator Schwellenbach's amendment related only to fresh fruits and vegetables. His thinking and discussions revolved around apples. He was especially concerned with an exemption which would equalize the small farmer (who has to rely for the services essential to marketing upon the purchasers, or upon bail es-for-hire) with farmers conducting operations large enough to enable them to perform their own storing, preparation, packing, etc. for market on or off the farm (81 Cong. Rec. July 30, 1937, pps. 7876-7878). He indicated clearly that "the area of production", was intended to mean simply any geographic area characterized by production of the product or products involved.

SENATOR CONNALLY: "The effect of the amendment is to exempt all employees of apple packing plants; is it not?"

SENATOR SCHWELLENBACH: 2 If they are engaged in the area of production and so long as the apples are in natural or raw state; yes, sir." (8) Cong. 7876)

The recent and current condition of American agriculture certainly continues to justify the Congressional solicitude manifested in Sections 13(a)(6) and 13(a)(10) of the Act. All segments of our national economy are booming, except agriculture. Every indicator of the economic welfare of agriculture (with the single exception of land galues) has fallen substantially, and the trend is still downward. For 1954, realized net income from farming had fallen 21.2% since 1946, whereas national disposable personal income had increased by 60% (see Appendix A heretage While the average size of American farms is increasing, the average cotton farm (like most other farms) is still

pure small and continues to justify the Congressional purpose of Section 13(a)(10) to keep small farmers equalized under the Act with the operators of farms sufficiently large to justify the storing, packing, preparation for market. Etc. by the farmer. For example: in 1953, 20.5% of all cotton farms were less than five acres; 54.7% were less than 15 acres; and 73.9% were less than 30 acres. (U. S. D. A., Commodity Stabilization Service, Cotton Division, unpublished statistics.)

III: The Piling and Re Piling of Tobacco Is Not Manufacturing or Industrial Processing. It Leaves the Tobacco in its "Raw or Natural State" Within the Meaning of Sec. 13(a) (10).

It is conceded that the tobacco is in its raw or natural state when delivered to respondents' packing houses. As the tobacco leaves respondents' packing houses it is not cooked, 'Tinished" or manufactured, nor has it undergone any mechanical or artificial processing. The only mechanical or artificial factor involved is air conditioning. That is, the regulation of temperature and humidity within the packing house. Such regulation of temperature and humidity is a beneficial and often necessary incident to the mere. storage and safekeeping of many farm and orchard prodnets (e.g., fruits and vegetables), sometimes for the purpose of retarding, and sometimes for the purpose of encouraging natural ripening or Jrying. It is a normal incident of "hot house" farming. Surely the gradual drying, fermentation, and other natural phenomena, which occur during and between the piling and re-piling of leaf tobacco no more transmute such tobacco from its raw state than does the ripening of fruits or vegetables in storage when controlled by the regulation of temperature and humidity.

· All of the changes which take place in such tobacco in the packing house are continuation of natural phynomena which begin, and occur in varying degrees, in the tobacco barns on the farm (RK 7-10). Clearly the piling and re-piling do. not in any way after the nature of such natural changes. The purpose and the effect are to provide conditions conducive to the uninterrupted continuation of, and which in some degree hasten these natural processes (the result of .. placing a relatively large quantity in one pile); and to permit their more uniform development in all tobacco throughout the pile (which results from remaking the piles from time to time, moving tobacco from the inside to the outside and from the outside to the inside of the pile). These operations simply interpose some degree of encouragement and control of these natural developments. The nature and result of such developments appear to be analogous to the controlled ripening of tomatoes, avacados, pears, apples or bananas in storage. In each instance, it is natural for internal chemical and physical changes to take place which, when properly controlled as to extent and uniformity, make the product suitable, or more suitable, for its intended human consumption or use. Neither procedure involves manufacture, mutilation, or the use of artificial catalysts (RK 7-10, 35, 49-53). Surely the resulting product in either case is an agricultural product in its "natural stafe."

It clearly appears that all of the operations performed by employees in respondents' packing houses consist of the physical "handling" of the tobacco. The "storing" and physical safe-keeping of the tobacco, while not the primary purpose of all packing house operations, is an inevitable and necessary concomitant of all such operations. "Drying" is involved. "Packing" is an essential part of such operations. Thus such operations in the aggregate include four of the operations specifically named in the exemption ("han-

dling," "packing," "storing," and "drying") none of which is qualified by the phrase "in their raw or natural state."

"Preparing" (for market) is the only term in Sec. 13(a) (10) which is qualified by the words "in their raw or natural state." It does not appear that any of respondents' employees is engaged in any activity not encompassed by the terms "handling", "packing", "storing" and "drying". However, if there were any such activity, it would fall inevitably within the residual or catch-all term "preparing in their raw or natural state."

The tobacco is ultimately sold and shipped unstemmed. (RB 141-142; RK 49, 50, 68). There is no mechanical processing operation involved such, for example, as the grinding of sugar cane and the reduction of the resulting juice to sugar or molasses. In Puerto Rico Tobacco Marketing Co-operative Association v. McComb, 181 F. (2d) 697 (C. A. -1, 1950), Administrator (appellee) McComb conceded, and both trial and appellate courts found that tobacco continues in its raw or natural state until the stems are removed from the leaves after piling ("bulking").

Prior to December 25, 1946, and in his new definition promulgated on that date, until January 1, 1949, the Administrator's definition of the area of production of Puerto Rican leaf tobacco described the exempt operations under Section 13(a)(10) of the Act as including the "piling, bulking, or otherwise handling unstripped (unstemmed) tobacco for market ... (29 C. F. R. 536.2(c) prior to December 25, 1946; and 29 C. F. R. 536.2(a)(2) from December 25, 1946 through December 31, 1948). In an amendment of November 18, 1948 (13 F. R. 7347) effective January 1, 1949, the Administrator deleted from his regulation all references to Puerto Rican Leaf tobacco, announce

ing of leaf tobacco... will not provide a basis for exemping that his purpose was "to make it clear" that the "bulktion" under Section $13(\pi)(10)$.

There is no indication that the Congress even knew of the Adr instrator's reversal of his long standing interpretation, or his re-construction of Sec. 13(a)(10) as not applying to the bulking of tobacco. That re-construction was and is inconsistent with Section 13(a)(10) as originally enacted, and as re-enacted in 1949, and was therefore excepted from the general continuation of administrative regulations and interpretations by Section 16(c) of the 1949 amendatory Act, which is qualified by the words: "except to the extent that any such regulation, (or) interpretation is may be inconsistent with the provisions of this Act? "Petitioner errs indeed in arguing (Br. 17-18) that Section 16(c) "ratified" his reversal of the reasonable and logical construction applied for more than ten years.

IV-A: The Section 13(a)(6) Exemption of Agricultural Employment Applies to the Operations of Respondents May and King Edward

Section 13(a)(6) of the Act grants a complete exemption from the minimum wage and overtime requirements to "any employee employed in agriculture"; and Section 3(f) specifies what is included within the term "agriculture":

"As used in this Act—'agriculture' includes . . . any practices . . performed by a farmer . . . as an incident to or in conjunction with . . . farming operations, including preparation for market (and) delivery . . . to market . . ." (Emphasis added)

In common usage, and according to Webster's International Dictionary, the words "any practices . . . performed by a farmer' clearly mean cach practice performed by any farmer. Otherwise these familiar English words have lost their meaning. When a specific provision of a statute is clear, and consistent in context, there is no need for recourse to the sometimes dubious "light" of legislative history. This provision expresses (unaided) a clear and consistent purpose to exempt any farmer in the performance of any practice, so long as that practice is performed either has an incident to", "or", "in conjunction with" any of the previously detailed "farming operations." By reference to Section 15(g) of the Agricultural Marketing Act (12 USC 1141j(g)) the definition of agriculture is extended to include the production of gum spirits of turpentine, and gum rosin "as processed by the original producer of the crude gum (oleoresin) from which derived."

Petitioner relies (Br. p. 51) on the following quotation from Maneja v. Waialua Agricultural Company, 349 U.S. 254, 260:

"Nevertheless, no matter how broad the exemption, it was meant to apply only to agriculture and we are left with the problem of what is and what is not properly included within that term."

From the remainder of the Court's opinion in Waialua, it is plain that this Court did not mean that the statutory definition of "agriculture" in Section 3(f) of the Act could be ignored in determining what constitutes "agriculture." The quoted sentence merely indicates that the Court was "left with the problem" of ascertaining the meaning of the words employed in the statutory definition. For the reasons which follow, we think it clear that all of the operations here involved fall within both the letter and the spirit of that statutory definition, and of the exemption provided in Section 13(a)(6). If the Court were to reach a contrary conclu-

sion, then, not only May and King Edward, in their packing house operations on Type 62 tobacco at Quincy, Florida, but all American agriculture would be substantially deprived of the exemption now granted in the Act to farmers in their off-the-farm storing, servicing and processing of their crops for market.

Whether an individual proprietorship, a partnership or a corporation, practically every farm enterprise in the United States, whether large or small, and whether it produces livestock, milk, grain, forage crops, seed, cotton, fruits. vegetables, tobacco or any other agricultural or horticultural commodity, engages in one or more of the activities conducted by respondents in their packing houses. The operations of all farmer include the "handling" of the products of the farm. A great many farmers and horticulturists 'pack" their farm products for market, and "store" their . farm products for market. Many "dry" such products as apples, grapes, peaches, apricots, etc., for market. Both on and off the farm, many farmers conduct operations much more in the nature of "industrial processing" than the curing and piling of leaf tobacco. For example, many farmers can their own fruits and vegetables, slaughter and dress their own poultry and hogs, provess their own apples into cider, pomace and apple butter, convert maple sap into maple syrup and maple sugar, mechanically clean their own apples, Etc.

It is perfectly plain then that the statutory definition of agriculture, when it refers to "farming in all its branches" and to "any practices", performed by a farmer. as an incident to or in conjunction with such farming operations, including preparation for market, delivery. to market", Etc., includes all of the activities mentioned above, and all of the activities performed by respondents' employees in their packing houses on the product of their farming operations.

The legislative history will be searched in vain for any hint that Congress intended by the agricultural exemption to exempt only small farms, or small farmers, or to restrict the exemption of off-the-farm operations to those performed by an farmers or to those performed by farmers generally. Qualification of the performance of farmer practices by the word "ordinarily" was once proposed (8t Cong. Rec. 7657), but was rejected. The ginning of their own cotton, though not a practice generally performed by farmers, is unquestionably exempt when performed by farmers either on or off the farm (81 Cong. Rec. 7656, 7659, 7660, 7657; Maneja v. Waialua Agricultural Co., 349 U.S. 254, 268).

In the very nature of things, such farmer practices as those of respondents herein, and the ginning of cotton, the washing and cleaning of apples, Etc., can be and are performed only by farmers producing a sufficient volume to justify the expense of the facilities and equipment with which to perform such operations. To the extent that the farmers' volumes of production can and do justify such practices by the farmer, they are practices "ordinarily" performed by such a farmer. To the extent that farmers' volumes of production are not sufficiently large to justify or permit such practices by the farmers, such operations are not performed by the farmers at all, and such smaller farmers are compelled to rely for such services and processing upon bailees-for-hire or the purchasers of their products (one of the underlying reasons for enactment of the Section 13(a)(10) (exemption).

The legislative purpose of the agricultural exemption was to spare the farmer from additional costs. Furthermore, Congress recognized that farm operations, and the servicing and processing of farm products, unlike industrial operations, cannot be regulated by the clock. The coming and

going of the seasons do not await the pleasure of man. Sunshine, rain, humidity and warmth are not yet subject to man's control. The time to plant and the time to harvest are determined by the vagaries of nature. Calves, lambs. and pigs are born at all hours of the day and night. Livestock must be fed and cows must be milked eacheday, including Saturdays Sundays and holidays. Plant and animal growth (like the curing and ripening of tobacco in packing houses) continues around the clock. Successful farming and farmer-processing or servicing demand long hours of labor on certain days, and few hours of labor on others. Frost, heat, humidity, rainfall, relative day and night temperature. presence or absence of pests, and the incidence of disease are the practical factors governing these demands. In an efficient farming or farmer-processing or servicing operation, no limitation or regulation of the farmer's hours is possible.

Senator McAdoo proposed an amendment to the definition of agriculture which would have exempted "any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state," any products derived from any of the above agricultural pursuits."

In support of his proposed amendment, Senator Mc. Adoo described the situation in these words:

"These agricultural commodities are highly perishable, and the work which must be done by the packing houses, and on the farm varies greatly with temperature variations. Twenty four hours in advance, one cannot know whether the crop must be moved. So, to

When it was pointed out that an earlier amendment already adopted by the Senate covered the situation about which he was concerned, Senator Mc-Adoo withdrew his amendment. (81 Cong. Rec. 7927-7929)

fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with the workers available. The broadening of the definition as I have suggested is not only directly in line with the object of the bill, but will also protect the farmers, who, in my State at East, are engaged in a method of marketing, packing and handling their crops which may differ from the methods employed in other States." (SI Cong. Rec. 7927).

Whether or not a farming operation, or a farmer-processing or servicing operation, is large or small, mechanized or not, the farmer must perform the farming and the work of farmer-processing or servicing when he can, depending upon the factors and conditions of nature. For this reason, among others, Congress granted a complete exemption to all agriculture, and to every practice of every farmer performed as an incident to or in conjunction with his farming operations, regardless of all other factors. Petitioner herein has ignored that Congressional purpose.

IV-B: Farmers Have Relied, and Are Entitled to Rely, Upon the Interpretations of the Department of Labor in Regarding as Exempt Their Various Farm Activities and Farmer-Processing and Servicing Activities.

Concurrently with issuance by the Administrator of Interpretative Bulletin No. 14, the Administrator issued a press release indicating that such administrative interpretation of the agricultural exemption was made only after lengthy conferences with representatives of employers, employees and other interested parties, and consultation with authorities in the U. S. Department of Agriculture. The release indicated that Labor Department attorneys had given intensive study to the legislative history of Section 13(a)

(6), and that the Department had considered economic studies made by its economists to assist it in properly ascertaining the scope of the exemption. It was only after such lengthy and intensive investigations and discussions that the Administrator issued official opinions on the subject. Those opinions were widely circulated through Interpretative Bulletin No. 14, press releases. Etc.

When those official interpretations were announced, the farmers of the Nation relied upon them, and were guided by them in considering the compensation and working conditions of their employees. Those interpretations (as set forth in the brief of respondents King Edward and Budd herein) were never modified. Since they are in harmony with both the language and the spirit of the exemptive provisions, they deserve the respect which this Court has said is due such administrative interpretations. United States v. American Trucking Associations, Inc., et al., 310 U. S. 534, 549. This Court has also said that employers, as well as courts, may properly resort to such interpretations for guidance. Skidmore v. Swift, 323 U. S. 134, 140. The right of employers to rely, and the immunity of employers based on reliance, on such interpretations by the Administrator or petitioner has been confirmed by Congress in the Portal to Portal Act of 1947, 61 Stat. 88, 89; 29 U.S. C. 258, 259.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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The Relative Condition of American Agriculture

Secretary of Agriculture Benson, speaking January 16, 1956 to the National Council of Farmer Cooperatives in Los An 1es (USDA release 137-56, sheet 5) stated that "about 1.5 million farm families in this Nation have incomes of less Chan \$1,000." Secretary Benson's statement dramatizes the general farm situation as reflected by the following facts:

Production expenses of U.S. farm operators for 1953 had increased 50% from 1946 and 259.4% from 1939 (USDA "Agricultural Statistics" 1954, p. 487, Table 671).

In total dollars the realized net income of farm operations for 1953 had fallen 9.8% since—1946; and net income of persons on farms 9.3%. During the same period national disposable personal income increased by 57.1% (USDA "Agricultural Statistics" 1954, p. 429, Table 604).

In 1954 the realized net income from farming dropped further to 21.2% under 1946 (USDA Agricultural Marketing Service "Farm Income Situation", October 1955, Table 1). By way of contrast, national disposable personal income for 1954 had risen 60% from 1946 (U.S. Department of Commerce, Office of Business Economics, "Survey of Current Business", July 1955, pp. 10-11).

A reduction in farm population is the obvious cause for a slight increase in average net income per capita for the farm worker and for the farm population from agriculture. Nevertheless, a similar, though less extensive, disparity persists between the income of the farm corker and the factory worker, and between the farm population and the non-farm population. The average net income per capita of the farm population from agriculture for 1954 was up

3.5% from 1946, whereas the average net income per capita for the non-farm population from non-farm sources was up 42.8% from 1946. Similarly the annual income per farm worker in 1954 was up 3.4% from 1946; whereas the annual income per factory worker in 1954 was up 64% from 1946. (USDA Agricultural Marketing Service "Farm Income Situation", October 1955, Tables 7 and 8.)

Farm mortgage debt has increased more than 70% since 1946 (USDA Agricultural Research Service, Neg. 55(6) 170).

Compared with the averages for calendar 1950, prices paid by farmers in December 1955 were up 9%; whereas prices received by farmers were down 13.6% (Statistical Abstract of the U. S., Bureau of the Census, 1955; p. 643, Table 781; "Agricultural Situation" USDA Agricultural Marketing Service, January 1956, Vol. 40, No. 1; p. 24.)

The farmer's share of the retail price of food in November, 1955 was 39%, a decline of 25% from the average of 1946). CSDA "Agricultural Statistics" 1954) p. 466, Table 655; USDA Agricultural Marketing Service "Agricultural Situation" January 1956, Vol. 40, No. 1, p. 24.)

Farmers' costs of marketing food crops in 1955 were up 4% from 1954 and up 21% from the average of 1947-49, whereas farmers' receipts for food crops were 3% down from 1954 and 16% down from the average of 1947-49.

This does not mean that food marketing agencies are reaping additional profits. It indicates increases in food marketing costs. For example, the hourly earning rates of wages and salaries in food marketing for 1954 were 51% above the average for 1947-49; though by increased productivity, total labor costs were held at 39% above the average for 1947-49. Wages in food marketing for September

1955 were 44% above the average for 1947-49. Current rail freight rates on major agricultural commodities are 24% above the average for 1947-49.

Actually food processors' profits after income taxes' amounted to 1.8% of sales for 1954; down 21.7% from 1947-49. Food wholesalers' profits after income taxes for 1954 were 1.0% of sales; down 41.2% from 1947-49. Chain retailfood store profits after income taxes for 1954 were 1.0% of sales; down 28.6% from 1947-49.

(Authority for all of the above: USDA Agricultural Marketing Service, "Agricultural Situation" December, 1955, Vol. 39, No. 12, p. 9).

APPENDIX B

Pertinent Provisions of the Fair Labor Standards Act of 1938, As Amended

Sec. 3. As used in this Act-

(f) "Agriculture" in cludes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as omended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer of on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Sec. 13(a) The provisions of sections 6 and 7 shall not apply with respect to

(6) Any employee employed in agriculture or in connection with the operation or maintenance of ditches canals, reservoirs, or waterways, not owned or operated for profit, or operated on a share-crop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or



(10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or

APPENDIX O

Full Text of Administrator's Current Definition of the Area of Production; 29 C. F. R. 536.2, Federal Register December 25, 1946:

"Area of Production" as used in section 13(a)(10) of the Fair Labor Standards Act.

- (a) An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a) (10) in handling, packing, storing, ginning, compressing; pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making choese or hanter or other dairy products:
- in the open country or in a rural community and 95% of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:
 - (i) with respect to the ginning of cotton-10 miles;
 - (ii) with respect to operations on fresh fruits and vegetables -- 15 miles;
 - (iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this sub-section—20 miles:
 - (iv) with respect to the compressing and compressions warehousing of cotton, and operations on tobacco, grain, soyheans, poultry or eggs—50 miles.
 - (b) For the purposes of this regulation:
- (1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 59,000 or

three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

five air line miles of any city with a population of 500,000 or greater, according to the latest available. United States census.

- (2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms, within such specified distances.
- (3) The period for determining whether 95% of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.
- (4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily pressured in physical units that are not comparable.

Supreme Court of the United States

OCTOBER TERM, A. D. 1955.

No. 278

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

Petitioner,

VS.

JOSEPH T. BUDD, JR., and FLORENCE W. BUDD, co-partners, doing business as J. T. BUDD, JR., AND COMPANY, KING EDWARD TOBACCO COMPANY OF FLORIDA, and MAY TCRACCO COMPANY.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE PIFTH CIRCUIT.

Brief for American Farm Bureau Federation as Amicus Curiae.

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INDEX.

	PAGE
Statement	
Årgument	1.33
SUMMARY OF ARGUMENT.	
I. Bulking of tobacco'is a practice within to definition of agriculture under Section 3 of of the Act and therefore employees engaged such bulking operations are exempt from wa and hour provisions under Section 13 (a) (6)	a') in ge
(a) Section 3 (f) contains a broad, compr hensive, and far-reaching definition of t germ "agriculture."	
(b) Legislative history of Sections 13 (a) (a) and 3 (f) confirms that tobacco bulking operations were intended to be exempt	6)
(c). Bulking is an essential farming practi in preparing tobacco for market	ce 6
(d) Exemption is not destroyed because bul ing practice is time-consuming, required valuable equipment, and knowledge operation	es
(e) The Deartment of Labor thas held the activities in question to be exempt under Section 13 (a) (6)	ie er
 11. Employees engaged in tobacco bulking are empted under both Sections 13 (a) (b) at 13 (a) (10) of the Act (a) As applied to the facts in this case. Section 13 (a) (b) exempts the employee concerned herein because the Act clear provides for such exemption. 	id - 110 e. es

(1.)	Balking of tobacco is an exempt operation under Section 13 (a) 10).	i ii
(e)	Regulations of the Administrator defining area of production are not within the plainly designated intention of Congress and are therefore inconsistent with the Act	100
Conclusion		X
Cases:	CITATIONS.	
	on v. Holly Hill Fruit Products Co., 322 5, 607	
Barron	Coop. Creamery v. Wickard, 140 F. 2d 485	12
Comme	onwealth v. Grunseit, 67 C.L.R. 58	lfi
Damut	z v. Pinchbeck, 148 F. 2d. 882	7
	rs Reservoir and Irrigation Co. v. McComb,	-
Lynch	v. Alsworth-Stephens Co., 267 U. S. 364	12
Maneja	a v. Waialua Agricultural Co., 349 U. S. 254	6
Nation	al Labor Relations Boad v. John Campbell, 159 F. 2d 186	7
Redian	nds Foothill Groves v. Jacobs, 30 F. Supp.	7

Statutes Fair Labor Standards Act of 1938, as an ended, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 1 S.C. 201); Sec. 3 (f) Sec. 13. (a) (6) 3, 8,10 Sec. 13 (a) (10) 10, 11, 13, 16, 17

Fair Labor Standard's Amendments of 1949, 63 Stat. 910:

See	3100	101			
		1.0			

Miscellaneous:

81 Cong Rec. :

P. 7648	4, 6
Pp. 7657-7659	4
P. 7658	6
P. 7877	13

	Rec. :				
P					
	402			enga kanapany	
	7407				

95 Cong. Rec.:		
P. 12436		15
P. 14869	12	2, 16
Pp. 14869-14870	· · · · · · · · · · · · · · · · · · ·	16
We want our contract to	and the same of the same of	
H. Rep. No. 1452, 75th Cong.,	1st Sess., pp. 4, 0,0	
111		- 5
4		
H. Rep. No. 2182, 75th Cong.,	3rd Sess., p. 2	5
Interpretative Bulletin No. 1-	f, Wage and Hour	
Division, Department of Lal	oor August 1939	
27776101, 1747411011, 174	8-10,	12
U.S. Conens of Population 19	50 Volume II Pt 1	1.1

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief for American Farm Bureau Federation as Amicus Curiae:

Statement.

The American Farm Bureau Federation is a non-profit corporation organized under the laws of the State of Illinois with its principal office in Chicago, Illinois It is a voluntary organization of more than 1,600,000 farm and ranch families in the 48 States and Puerto Rico. It was organized in 1919 to the purpose of promoting, protecting, and representing the business; economic, social, and educational interests of the farmers of the nation and to develop agriculture.

The interest of the American Face Bureau Federation in this case derives from the fact that the design of the District Court, which Petitioner seeks to have this Court approve, would deprive many farmers of this faction of the agriculture exemption with respect to gertain activities which clearly fall within the intent, language and purpose of the exemptions provided by the Fair Labor Standards Act, for Agriculture, Restrictions upon application of these exemptions have far reaching effects upon the future of agriculture.

In adopting the Fair Labor Standards Act, Congress never intended that the Wage and Hour Division of the Department of Labor would control, direct, have dominion over, or have any effect upon agricultural operations or pursuits. Petitioner's brief clearly shows an unauthorized attempt by the Administrator to accomplish this improper objective.

As used in the Petitioner's brief, "RB" references will be to the Budd Record, while "RK" references will be to the King Edward and May Record.

ARGUMENT

I

Bulking of tobacco is a practice within the definition of agriculture under Section 3 (f) of the Act and therefore employees engaged in such bulking operations are exempt from wage and hour provisions under Section 13 (a) (6).

(a)

Section 3 (f) contains a broad, comprehensive, and far-reaching definition of the term "Agriculture."

Congress defined "agriculture" in Section 3 (f) as follows:

branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15 (g), of the Agricultural Marketing Act, as amended), the raising, of livestock, boes, fur-bearing animals, or poultry, and any practices (including any forestry, or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunctivith such farming operations, including preparation for market delivery to storage or to market delivery to storage or to market for transportation to market. (Emphasis supplied)

(b)

Legislative history of Sections 13 (a) (6) and 3 (f) confirms that tobacco bulking operations were intended to be exempt.

As the bill which finally became the Fair Laker Standards Act worked its way through the legislative process to final passage, repeated assurances were given by mem-

bers of the Congress that a full exemption had been accorded to all activities performed by the farmer or on the farm in connection with the growing and marketing of farm crops. All agreed that the agricultural exemption was to be plenarly and that all agriculture without exception was excluded from the coverage of the Act.

It is obvious from the legislative history that the bill never would have become law but for such assurances and the consequent feeling on the part of the legislators that all agriculture was in fact exempt. 83 Cong. Rec., 7393, 9257.

The bill (S. 2475) was introduced in the Senate on May 24, 1937, and was referred to the Senate Committee on Education and Labor, which wrote the broad definition of "agriculture". S. 2475 as reported in the Senate, July 6, 1937, Sec. 2, pp. 59-51. Senator Black/Chairman of the Senate Committee in charge of the bill, stated to the Senate that the bill specifically excluded workers in agriculture of all kinds and of all types: 81 Cong. Rec., 7648. When he made this statement, the agricultural definition in the bill, insofar as it related to practices incidental to farming operations, limited the exemption to those practices "ordinarily" performed by a farmer as an incident to farming operations.

In various colloquies between Senator Black and other Senators, the former made it clear that the exemption applied to all the things the farmer did with reference to producing his crops and marketing them, whether the crops were cotton, fruits or vergtables, or any other commodity, 81 Cong. Rec., 7657, 7658, 7659.

When the bill, as amended and passed by the Senate, went to the House of Representatives, the House Labor Committee rewrote the agricultural exemption and pur-

posely struck the word "ordinarily" from that part of the definition relating to incidental practices. H. Rep. No. 1452, 75th Cong., 1st Sess., pp. 4-5, 71. The word ordinarily never again reappeared in the definition. The bill as it was first reported by the House Tabor Committee was recommitted to such Committee and on April 21, 1938; another draft of S. 2475 was reported to the House. As so reported, once again the definition of "agriculture" was broadened by adding to the incidental practices portion of the definition the activities of "preparation for market", "delivery to storage", and "delivery" to carriers for transportation to market." H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2. In this form the bill passed the House.

The two Houses of Congress then held a conference on the bill. In such conference they not only retained every amendment that had previously broadened the definition of "agriculture" but they went still further. They broadened the exemption still more by exempting all practices performed by a farmer or on a farm in conjunction with such farming operations." 83 Cong. Rec., 9253-9254.

When the conference report was debated in the Senate, Senator Thomas of Utah, who had succeeded Senator Black as Chairman of the Senate Committee on Edzeation and Labor, and was chairman of the Senate conferees, stated that agriculture was exempted from the operation of the bill, that he did not know of any kind of agriculture that was included in the bill, and that the committee was purposely made all inclusive, 83 Cong. Bec., 9162-9163.

This Court has said that "Congress exempted agriculture from the terms of the Fair Labor Standards Act in broad, inclusive terms" and that "The exemption was meant to embrace the whole field of agriculture, and sponsors of the legislation so stated, \$1 Cong. Rec., 7648; 7658" (Maneja v. Waialaa Agricultural Co., 349 U. S. 254, 259, 260).

This Court further stated in the Waialua case, in commenting on the legislative history of the agricultural exemption (p. 260):

"Although this language was described by those in charge of the bill in the Senate as 'perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal,' 81 Cong. Rec., 7648, its coverage was broadened until it became coterminous with the sum of those activities necessary in the cultivation of crops, their harvesting, and their 'preparation for market, delivery to storage or to market or to carriers for transportation to market."

(c)

Bulking is an essential farming practice in preparing tobacco for market.

The Court of Appeals correctly concluded that everything done by these farmers was essential for the marketing of their crops, and that the work of their employees, in the preparation for market of the leaf grown exclusively on their farms, constitutes "practices performed by a farmer as an incident to or in conjunction with such farming operations, including preparation for market," within the meaning of Section 3 (f), RK 93.

The language of Section 3 (f) could not be more clear to evince an intent to exempt all activities performed by the farmer or on the farm in connection with growing and marketing the farm's crops.

Practically every farmer in the United States, whether large or small, is concerned with preparing an agricul-

tural or horticultural commodity for market. Almost all farmers, as part of their harvesting operations, haul their crops to a storage place or a processing plant located either on or off the farm or to some market. A great many of them conduct extensive processing operations upon their own crops. For example, many fruit and vegetable farmers pack and can their own fruits and vegetables; many cotton farmers gin their own cotton; many poultry and hog farmers slaughter and dress their poultry and hogs. The apple farmer, for example, may haul his apples to a storage place on the farm or he may sort, wrap and pack the apples and otherwise prepare them for market or he may process the apples in one form or another. Unquestionably, when so performed, these are operations performed by a farmer or on a farm as an incident to or in conjunction with farming operations. Farmers Reservoir and Irrigation Co., v. McComb. 337 U. S. 755, 763, 766, note 15; Redlands Footbill Groves v. Jacobs. 30 F. Supp., 995, 1006; Danut's v. Pinchbeck, 158 F. (2d) 882, 883; Addison et al v. Holly Hill Fruit Products, Inc.. 322 U. S. 612; National Labor Relations Board v. John Gamphell, Inc., 159 F. 2d, 186, 187.

(d)

Exemption is not destroyed because bulking practice is time-consuming, requires valuable equipment, and knowledge of operation.

The Petitioner argues that tobacco bulking is a complicated, tedious, difficult and even scientific operation as distinguished from the actual growing of tobacco. We cannot agree. In fact, tobacco bulking is an easier, simpler task than the actual production of the crop on farms.

According to the Record, nothing is added to or taken from the tobacco during this bulking operation, except

through the natural process of evaporation and fermentation, other than sprinkling with water or kasing (RK 52).

The contention of the Petitioner that the bulking of tobacco requires as much as 12 months time is not determinative, or of any importance, to the questions involved in this proceeding. Such period of time is no more than is required for the actual growing or production on farms of many agricultural products.

Considering this type of argument by the Petitioner; we would not be surprised to see the Administrator claiming that the actual growing of Type 62 shade leaf tobacco is not an exempted agricultural activity because it is grown in fields completely enclosed and covered with cheesecloth shade.

(e)

The Department of Labor has held the activities in question to be exempt under Section 13 (a) (6).

Interpretative Bulletin No. 14, issued in August, 1939, (3 C.C.H. Labor Law Reporter 24,488), in construing the agricultural exemption, stated in paragraph 10 (b):

- '(b) The term 'preparation for market' must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:
- 1. Grain, seed, and forage crops:—Weighing, binning, stocking, cleaning, grading, shelling, sorting, packing and storing.
- 2 Fruits and vegetables.—Assembling, binning, ripening, cleaning, grading, sorting, drying, preserving, packing, storing, and canning.
- 3. Nats (pecans, walnuts, peanuts, etc.). Grading, cracking, shelling, cleaning, sorting, packing, and storing, unshelled muss; and performing the same

sperations except cracking and shelling, upon the nut meats.

- 4. Sugar. Manufacturing raw sugar, cane, or maple syrup and molasses.
- Eggs.—Handling, cooling, grading, and packing.
 - 6. Wool Grading and packing.
- 7. Dairy products.—Salting, printing, wrapping, packing and storing butter; ripening, molding, wrapping, packing, and storing cheese; and canning or packing any other dairy product.
- 8. Cetton.—Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.
- Nursery stock.—Handling, wrapping, packaging, and grading.
- 10. Tobacco.—Handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing.
 - 11. Livestock.-Handling and loading.
- 12: Poultry. Culling, grading, cooping, and loading.
- 13. Honey.—Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.
- 14. Fur.—Removing the pelt, scraping, drying, putting on boards and packing."

According to a press release issued by the Department at the same time as Interpretative Bulletin No. 14, the Department's interpretations of the agricultural exemption in the Act were made only after lengthy conferences with representatives of employers, employees and other interested parties: Authorities of the United States Department of Agriculture were also consulted. Much time, was devoted by the Department's attorneys to a study of the legislative history of Section 13 (a) (6). The Department also had its economists make, economic studies in

order to assist in a proper determination of the scope of the exemption. It was only after these lengthy investigations and discussions that the Department announced its opinions on the subject. Such opinions were widely circulated through Interpretative Bulletin No. 14, press releases and other releases to the various labor law publications.

Since "bulking" was listed under "Tobacco" (item 10), tobacco farmers have had every reason to believe that this was one of the exempt activities, even within the Administrator's restricted application of the exemption provisions of the Act.

11.

Employees engaged in tobacco bulking are exempted under both sections 13 (a) (6) and 13 (a) (10) of the Act.

(a)

As applied to the facts in this case, Section 13 (a) (b) exempts the employees concerned herein because the Act clearly provides for such exemption.

Authoritatively paraphrased, the Act provides that the provisions for minimum wages and maximum hours shall not apply to any employee engaged in agriculture. Application of the statutory definition of "agriculture" to tobacco bulking has already been discussed in this brief. (See supra. p. 6)

(b)

Bulking of tobacco is an exempt operation under Section 13 (a) (10).

We cannot agree with the Petitioner's argument that bulking of tobacco is more of an industrial process than

an agricultural operation and, therefore, is not covered under Section 13 (a) (10).

The operations enumerated in this Section (e.g., handling, packing, storing, processing, drying), cover a very comprehensive field in agriculture. This was obviously intended by Congress.

On May 24, 1938, the following statements were made by Congressman Biermann during consideration of his amendment (which became the exemptions in Section 13 (a) (10) to the Wage and Hour Bill):

"This bill is aimed at sub-standard labor conditions, and I submit that any Member of this House who is familiar with the kind of institution that this amendment I have offered is aimed at will agree with me when I say that sub-standard labor conditions do not exist in these institutions. In an amendment I inscrted in the Record yesterday I included the word 'processing.' I call attention to the fact that in the pending amendment that word is stricken out. I struck it out for the reason that some Members thought that processing would include the making of cotton and wool into textiles, and tubber into finished products; and a long list of things of that kind. The amendment I have offered includes only the first processing of things of that kind. The amendment I have offered includes only the first processing of things that came off the farm. The immertant point is that the tarmer pass the hill-ter Per. 7401)

During consideration by the Senate of the 1949 Amendaments to the Act. Senator Pepper made the following statement in answer to an inquiry concerning the scope of the existing exemptions in Section 3(a)(10):

'In other words, the processing of agricultural connectities which occurs within the area of production is at the present time except from the min-

mum-wage and maximum hours provisions of the law." (95 Cong. Rec., 14869).

If tobacco bulking was intended by Congress to be considered an industrial process, then why did the Department of Labor include bulking in its Interpretative Bulletin No 14, issued in August, 1939 as one of the exempt activities by a farmer in preparing a commodity for market? (supra, page 9)

It is a well recognized principle that. The plane obevious and rational meaning of a statute is always to be preferred to any curious, narrow hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover (Lunch v. Alsworth-Stephens Co., 267 U.S. 264, 370). Administrative orders, like statutes, are not to be given strained and unnatural constructions. The language of a regulation should be considered as intended to guide and not to entrap those who are governed by if. Barron Coop. Creamery et al. v. Wickerd, 140 Upd. 28, 485, 488.

(c)

Regulations of the administrator defining "Area of Production" are not within the plainly designated intention of Congress and are therefore inconsistent with the Act.

The Court of Appeals correctly concluded that the Administrator exceeded his authority in excluding from the area of production, "any city, town, or urban place of 2,500 or greater population." RR 163,

It is recognized that in those exemptions which depend upon administrative action, the Ydmizistrator must "properly weight and synthesize" all the factors relevant to the general purposes of the Net. Addison v. H. Ma.

Hill Fruit Products: Inc., 322 U.S. 607. However, his power and freedom of expression are always limited by the mandates of Congress, as was emphasized by this Court in the Hella Hill case. He can neither enlarge nor contract the intended exemption area.

The legislation history of the Act clearly indicates that it was not the intent of Congress for the Administrator to adopt such a restrictive defintion of area of production. This is syideneed by the comments made by Sentator Schwellenbach and Representative Biermann, who sponsored amendments providing for the exemptions within the farea of production which were later incorporated into Section 13 (a) (10) of the Act

The following statements were made by Senature Schwellenbach on July 30, 1937, in answer to questions concerning his proposed amendments.

Mr. Connally: "Mr. President, behand like to ask the Senator from Washington a question. Would not the effect of his amendment be to exempt all industrial warehouses and packing plants in apple territory." There is no limit. The condition is that they are packing plants; and if they are, they are exempt.

Mr. Schwellenbach. If a packing plant is working upon fresh fruits or vegetables, in their raw or natural state, within the inimediate production area, it would be exempt.

Mr. Connally: 'My understanding is that the largest apple packing plant in the world is becated at Winehester, Va., right in the heart of a great apple producing region! Plant would be exempt, would it not!

Mr Schwellenbach. "It the work done in that plant is as described in the amendment, it would be exempt," (81 Cong. Rec. p. 7877).

During the debate of Congressman Birmann's amend, ment (see supra, p. 11), he read to members of the House the following paragraphs from a letter that he had received from Mr. Edward O'Neal, then President of the American Farm Bureau Federation:

We believe the bill should be claimfed so as to assure the exemption of employees in such agriculture, and horticulture industries in rural areas."

"Failure to exempt these operations when performed in rural areas where conditions are so greatly different from the situation in large industrial and urban centers, will result in increased costs of processing and handling these products which will be reflected back in lower prices paid to farmers." (83) Cong. Rec. 7402).

After reading the first paragraph, Mr. Bierman commented, That is all my amendment takes in. Mr. Biermann's amendment was adopted by a vote of 159 to 134 v83 Cong. Rec. May 25, 1908, pg. 7407).

The above statement by Senator Schuellenbach that Winchester, U.a., would be in the traver of production? is of almost importance in view of the fact that the population of Winchester by 1940, was 12,095. (Census of Population, 1950, Volume II, Pr. 1) Prespective of any arguments as to what commodities or activities are covered by Section I3 (a) (10), there can be no question concerning the intent of Congress to include such cities as Winchester with a population of 12,000 as being within the tarea of production.) In fact, we can find to evidence that Congress intended that a population that he used in determining tarea of production.

Contrary to what the Petitioner contends, the question of the 2,500 population test was not at issue on the Holon Hill case. This Court, in holding invalid the Administrator's exclusion of establishments having in excess of seven employees, stated:

"Concluding then that when Congress granted exemptions for workers within the 'area of production' (as defined by the Administrator) it restricted the Administrator to the drawing of geographic lines, even though he may take into account all relevant economic factors in the choice of areas open to him, the regulations which made discriminations within the area defined by applying the exemption only to plants & with less than seven empoyees are ultil vires." (322 U.S. 619).

We recognize the difficulty involved in preparing a definition of the 'area of production', which will not be "subject to some criticism. This problem was pointed out in a letter dated June 17, 1949, from the then Secretary of Agriculture to the Chairman of the House Committee on Education and Labor during the time that consideration was being given to the amendments of the Act. This letter reads in part as follows:

"I do not think I need to set forth in detail the difficulties of defining the term area of production. This Department is aware of these difficulties. having been consulted by the Secretary of Labor. prior to the issuance by the Administrator of the Wage and Hour Division of the present regulations under the Fair Labor Standards Act dealing with this matter. The subject has been one of fairly extensive discussion and correspondence between the Department of Labor and the Department of Agriculture. As a result of these discussions, I am in agreement with the Administrator that the area of production' concept is inherently inequitable and that corrective action should be taken by Congress to eliminate these meguities in the interest of sound public policy." (95 Cong. Rec., p. 12436).

Thus, the Secretary was saying that the definition was admittedly inequitable. The Secretary also advised Congress that he did not favor any transfer of authority to

the Secretary of Agriculture with respect to the defini-

We cannot agree with the argument of the petitioner that Congress has, in effect, approved the Alministrator's definition since it did not amend Section 13 (a)(10) during its consideration of the Fair Labor Standards Amendments. The legislative history of the amendments to the Act in 1949 shows that Congress was not satisfied with the present definition of the Administrator. 93 Cong. Rec., pp. 14869, 14870. During the consideration of the Conference Report, Senator Pepper made the following statement:

"I think it is the concensus of the opinion of the conferees that they hope the Wage and Hour Administrator will constantly endeavor to improve the definition of 'area of production,' and, especially in the case of cotton, that he will apply it as liberally as possible." (95 Cong. Rec., October 18, 1949, p. 14869).

However, as his Court has said, "But it is no warrant for extending a statute that experience may disclose that it should have made more comprehensive" (Hollu Hill case, 322 U.S. 67). The natural meaning of words cannot be displaced by reference to difficulties in administration. (Commonwealth v. Granseit (1943) 67 C.L.R. 58, 80).

There is no substance in Petitioner's argument that Congress confirmed and ratified the Administrator's definition of area of production when it adopted Section 16 (c) of the Fair Labor Standards Amendments of 1949. See Brief for Secretary of Labor, pp. 34, 35. This congressional action merely concluded that existing regulations which were consistent with the Act chould remain in effect unless subsequently amended by the Administrator. Any orders regulation, or interpretation inconsistent with provisions of Fair Labor Standards Act was

expressly excepted 63 Stat. 920. This action cannot be considered as a confirmation or ratification of the definition. Passage of the 1949 amendments through the gengressonal legislative process was not the testing ground for the propriety, sufficiency, adequacy or legality of any regulation of the Mannistrator.

According to the Court of Appeals, the legislative history of Section 13 (a) (10) makes clear that its primary purpose was to prevent discrimination against the small farmer." RB 164. See Senator Schwellenbach's comments, RB 164. If the present definition which excludes towns of 2,500 or more from the "area of production" is upheld by this Court, then it is entirely possible that the future of agriculture will be in the direction of larger-type farming operations, requiring substantial financial resources, so that many of these activities covered in Section 13 (a) (10) can be performed on the farm.

Continued enforcement of the regulation under the Administrator's definition of "area of production" may well cause persons, such as the respondents here, to change or move their tobacco bulking operations to other locations. Congress never authorized such major social, economic, or political changes in agriculture of this country to be accomplished under guise of the Fair Labor, Standards Act.

We therefore, urge this Court to declare the Administrator's definition to be invalid and that he be requested to redefine "area of production" to conform with the clearly expressed mandate of Congress. This would follow the position taken by this Court in the Hollo Hill case:

We agree therefore with the Circuit Court of Appeals in helding invalid the directors as to the number of employees within the defined area. But we cannot follow that Court in deleting the part of the

administrative regulation and, by applying what remains of the definitions exempting Holly Hill's employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall. We can hardly assume that the Administrator would have defined threa of production, merely by deleting the employee provision, had he known of its invalidity. It would be the skeerest guesswork to believe that the elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for its to write a definition. That is the Administrator's duty."

(322 U.S. 618)

Conclusion.

For the foregoing reasons, the tobacco bulking practices and operations described in this case should be held to be exempt from the wage and hour provisions of the Fair Labor Standards Act and, therefore, the judgment of the Court of Appeals should be sustained.

Respectfully submitted,

MARTIN BURNS. ... ALLEN, LAUDERBAGH,

Attorneys for

American Farm Bureau Federation.

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 278.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,

KING EDWARD TOBACCO COMPANY OF FLORIDA and MAY TOBACCO COMPANY.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF AFREALS FOR THE FIETH CIRCUIT.

PETITION FOR REHEARING.

Washington 6, D & Yorney for King Edward Tobacco

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 278.

James P. Mirchell, Secretary of Labor, United States Department of Labor;

Petitioner.

US.

King Edward Tobacco Company of Florida and May Tobacco Company,

Respondents.

ON WEST OF CERTICRARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIETH CIRCUIT.

PETITION FOR REHEARING.

Respondent May Tobacco Company respectfully requests a rehearing upon the following grounds.

I

The Court's opinion (p. 8) states that delivery of the tobacco at the receiving platform of the packing plant is delivery. To market within the meaning of Section 3(f) of the Fair Labor Standards Act. In the case of May, there is not a syllable in the record to support such a statement. The transfer of May's antipened tobacco leaf from its curing barn on the form to its own packing plant does not involve a sale of the tobacco leaf to others. May does

not surrender title, possession or control of the leaf until the conclusion of the bulking operation and only thereafter is its tobacco leaf sold forothers (R. K. 68). Thus, the fundamental basis for the Court's conclusion that May was not critical to the exemption affor had by Sections 3(f) and 13(a)(6) of the Act (i.e., that there had been a delivery to market before the bulking operation) is included, the record is precisely to the contrary.

II.

The Crust's opinion (p. 2) stresses that the bulking operation requires a large amount of equipment. There is absolutely no proof in the King Edward May record that this is so. Indeed, the District Court in its supplemental opinion recognized this weakness in the petitioner's case but deemed it harmless to the respondents' case (R. K. 75). Obviously, this supposed necessity for large amounts of equipment weighted heavily with this Court in excluding May from the agricultural exemption.

III.

The Court's opinion (p. 8) states that "the bulking operation is a process which changes the natural state of the freshly enred tobacco as significantly as milling changes sugar cane." Even the expert upon whom the Government relied indicates that this cannot be so, for he says (R. K. 23) -

"Typical tobacco fermentation is but the resumption of reactions taking place in the later stages of curity in the been that have been temporarily suspended by the drying out of the leaf."

^{*} Record references are the same as in the facets originally submitted.

And again (R. K. 25):

"In mearly all cases, bowever, neither the path methodown the case sweat as initially carried out is sufficient to prepare cagar tobace. For manufacting."

Apart from these statements, we submit, with due deterence and great respect, that it is unrealistic to say that the ripening of unstemmed tobacco, which involves no application of machinery nor the aid, application nor use of any external catalyst but only simple manual labor (R. K. 69), is a process which changes tobacco as significantly as milling changes sugar cane. Sugar cane is cut, ground and pressed by the use of machinery and two different products—raw sugar and molasses—emerge.

1.V

What has been said in paragraphs I. II and III, supra, demonstrates, at the very teast, that the record in the May case is insufficient to justify the granting of summary peigment against May, with the consequent effect of depriving it of the opportunity to adduce evidence upon a trial in support of its claim to an exemption. For example, May should have the proportunity to show that machinery plays no part in the packing plant activities; that the equipment used at the packing plant is neither elaborate nor expensive; and that an exemble mingly high per entage of the time of May's employees at the packing plant is devoted to the simple process of plang and repiling the tobacco leaf. Upon a trial, the District Centr (by stigulation of the parties) could inspect the packing plant while the bulking activities are in progress and see how unindustrialized and simple the packing plant activities really are. The Government's supplemental memorandum (p. 4) concedes that the

record against May is sparse. In view of that concession, May should have an opportunity to make a full record. This cannot prejudice the Government, but if the summary indigment stands affirmed, May will be forever depriced of the opportunity to prove its eligibility for the agricultural exemption.

V

It may be that the Court reversed as to May as well as to Budd because it felt that a distinction between the two would result in an economic advantage to May. If this be so the decision has produced an ironical result. The opinion has sustained the validity of the area of production regulation made pursuant to Section $\Omega(q)(10)$ of the Act. Indeed, that was the principal point of the decision. Since many farmers are qualified under the area of production regulation they do not have to comply with the minimum wage and maximum hours provisions of the Act. But May cannot qualify without abandoning its packing plant at Quiney and transferring the packing plant activities to its farm. Thus, the effect of the Court's decision is to place. May at an economic disadvantage with many other growers of f. S. Type No. 62 tobacco.

prepulse, with the minimum wage and maximum hour provisions of the Act populses the contents of a true and thus assure that employees without he presumed in the second maximum should prevail upon the trial.

[&]quot;This possibility was alleged to at possible of particles supplemental memorionisms."

Conclusion..

May, therefore, respectfully requests, a rehearing, or, in the alternative, that the Court modify its decision to grant May a trial of the issues of fact.

Respectfully submitted, ?

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King Edward Tobacco Company of Florida also respectfully petitions for re-hearing upon the grounds hereinabove stated.

> Militon C. Denbo, 1625 K. St., N. W., Washington 6, D. C., Attorney for King Edward Tobacco Company of Florida.

· Certificate of Counsel.

The undersigned hereby certify that the foregoing petition for re-hearing is presented in good faith and not for delay.

> Mark F. Hughes Maton C. Denbo

> > i